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Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar

by **Robert T. Swaine** • of the New York Bar (New York City)

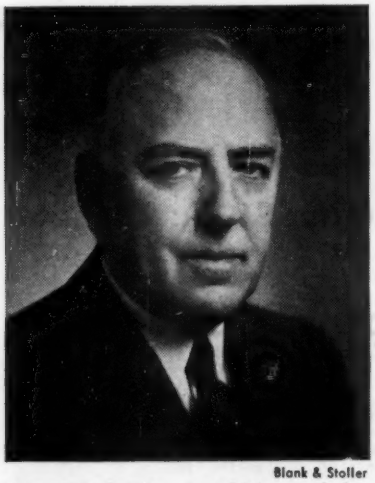
■ The growth of Big Business, Big Labor and Big Government has forced the modern lawyer to become a specialist in the mixed fields of law and business, abandoning the attorney's traditional role of advocate. In this article, originally delivered as an address before the Law Club of the City of Chicago, December 10, 1948, Mr. Swaine answers critics who charge that lawyers dominate our political and economic life, and members of the profession who deplore the "decline in the public influence of the Bar".

■ Over at least the last three decades many cynical magazine articles, lay and professional, have charged that the Priesthood of the Temple of Justice has surrendered it to Mammon. Chief Justice Stone in 1934, after lauding the famed advocates of a century and more ago for their many services to causes of personal liberty and of constitutional development, asserted that specialized service to business and finance had "made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations". Only a few weeks before his death in 1946 he chided us on "the regrettable decline in the public influence of the Bar", of which many of our colleagues have mourned, from Samuel J. Tilden in 1872 to Arthur T. Vanderbilt within the last month. Paradoxically, the plaint of most of the lay critics has been that the lawyers, as the "brains of capitalism", dominate both our political and economic life. For example, *Harper's* in 1939 told of the popular belief that Chicago had long been "run" by three of its large law firms.

It is our tradition that during the first decades of our republic lawyers were at the peak of their public influence. We were then an agricultural country; our problems were primarily political rather than economic. But American inventive genius was already beginning to develop the machines which changed us into an industrial nation. The transition was slow for a few decades, but rapid after the Civil War. Our individualistic economy began to change to a collectivist economy. The demands of new and expanding industries for capital could seldom be met by individual owners, and most of our instrumentalities of production became vested in corporations, collective juridical entities devised by the lawyers. Their stock and other securities, at first held locally, began in the 1880's to pass into wide public ownership. Potential markets expanded with the wide building of railroads, and during the decades of the "robber barons", competition became ruthless and unbridled. By the 1890's there was a pronounced trend toward the combination of large industrial units, both competitive and complementary.

It may be of interest to you that among them was a consolidation of breweries promoted by British bankers in 1889 which the Chicago *Tribune* reported as "entitled to the distinction of introducing into Chicago financial affairs the practice and the term 'underwriting' as applied to the sale of securities". The *Tribune* took great pride that although the transaction was "brought to a consummation by English methods, which are in some respects superior to those prevailing in this country . . . nearly two-thirds of the securities are taken by Chicago people and the managers of the enterprise are Chicago men".

The trend to industrial combination accelerated with the country's recovery from the panic of 1893. United States Steel, for example, was organized in 1901, and International Harvester in the same year. The wave of consolidations which marked the turn of the century was only slightly retarded by the panic of 1907; General Motors was organized in 1908. By World War I in many industries a comparatively limited number of corporations was able, by reason of the efficiency of their mass



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production, to dominate their markets. To remain in successful competition the smaller competitors themselves had to enlarge their production. Expansion was accomplished not only by absorbing competing and complementary businesses but by enlarging existing plants and constructing new plants to command new markets. The growth of great industrial corporations took a further upsurge during the roaring twenties and, after the depression of the early thirties, again became marked during World War II.

Big Labor Follows Establishment of Big Business

Big Business, with its collective ownership largely separated from management, lacked the old-time personal relationship between the individual proprietor-employer and his workmen. To remedy often inadequate wages and intolerable working conditions, collectivism of the workers necessarily followed. Big Labor began with the formation of the American Federation of Labor in 1881 to federate the unions which had organized skilled labor horizontally by crafts. It reached gigantic stature after 1935 when John L. Lewis formed the Committee for Industrial Organization to organize vertically the workers of entire industries.

By its too frequent disregard of its public obligations, Big Business also made Big Government inevitable. The Interstate Commerce Commission was created in 1887 to curb abuses in the railroad field. The activities of the great industrial corporations became a recognized menace to small individual business, to new ventures and to that very competition which is the essence of the American system of free private enterprise. Government had to intervene with the Sherman Act in 1890. Practically dormant for a decade, it was given life in the trust-busting crusade of Theodore Roosevelt. Since the Clayton Act and the Federal Trade Commission Act of the first Wilson administration, business has been subjected to a constantly increasing tangle of federal anti-trust legislation. Under it the Department of Justice, during the first three terms of Franklin Roosevelt, instituted 431 proceedings, civil and criminal, as contrasted with only 385 from 1890 to 1933.

New Deal Brings Alliance of Labor and Government

In our day the "robber barons" of nineteenth century industry have been paralleled by irresponsible leaders of Big Labor who have also too frequently forgotten their public obligations. With the triumph of the New Deal in 1933, however, Big Government allied with Big Labor against Big Business. Numerous federal administrative agencies with long names, known to the public only by their initials, were set up to impose government controls on business. In the depression-inspired reaction against the managements of industry, one-sided labor legislation was enacted and administered with extreme partisanship.

The New Deal took us far from the Jeffersonian philosophy that that government is best which governs least. World War II brought still Bigger Government. Although after the war many controls were lifted and Congress responded to the then public demand that our federal labor laws be made less one-sided and be administered with less partisanship, there seems to be little prospect, in the light of the event of November 2, that there will be any shrinkage of Big Government or any lessening of its hostility to Big Business, and some doubt that it will administer even-handed justice between Big Business and Big Labor.

These changes in the economic life of America necessarily brought about, though with considerable time lag, accommodating changes in the work and in the working habits of our profession.

Nineteenth Century Lawyers Romantically Pictured

Legend has it that when the great lawyer of the idyllic pastoral days of the early 1800's was not filling the halls of Congress or his state legislature with resounding periods on the political issues of the day, he was in the courts, a lone gladiator, defending the personal rights of the poor and oppressed against the owners of property, often defying the hostility of his community and always indifferent to mundane rewards. True, the lawyers were the greatest of the orators of America's golden age of oratory, and perhaps it is to be regretted that we have lost appetite for the glowing rhetoric of a century ago. But the conventional picture of the court work of the great lawyers of those times is romantic exaggeration. While they conscientiously fulfilled their duty to defend the poor and the friendless, their practice much more often related to property rights than to purely personal rights. For example, in the *Dartmouth College* case in 1819 and in *Gibbons* v. *Ogden* in 1824 Daniel Webster was dealing with questions not greatly different from those of the modern corporation lawyer. Similarly, although William H. Seward is best known, as a lawyer, for his defense of an insane Negro murderer in which he braved a local mob, and for his argument in the *Ohio Fugitive Slave* case, the foundation of Seward's modest fortune was his han-

dling of a readjustment of the affairs of the Holland Land Company in western New York after the panic of 1837, and from the late 1840's through the 1870's the major income of his Auburn firm and of the next generation of partners, including the later Justice Blatchford, who took the firm to New York City, came from patent cases.

Until the 1880's, however, the leaders of the American Bar did devote themselves almost exclusively to advocacy. While there were many law partnerships, they seldom had more than three or four partners and they had no legal assistants except uncompensated students preparing for examinations.

Growth of Business Changes the Practice of Law

As trade and industry passed from individual into corporate ownership, lawyers, who in earlier days were seldom called into business transactions until litigation had broken out, were summoned to organize the new corporations and supervise their security issues. Naturally the important retainers went to those lawyers who had already achieved high professional position, and, during the 1880's and 1890's, many leading advocates of New York, Philadelphia, Boston and Chicago were devoting an increasing part of their practice to office work, drafting legal documents to create, consolidate and reorganize corporations and to effect public issues of securities and advising on mixed questions of law and business arising daily in the operations of their clients.

The new practice involved much larger sums than that of the earlier days. The problems were more intricate, requiring much more time and effort; and frequently the line between a legal question and a business question was hard to draw.

There was a new tempo. In the earlier days high pressure had been infrequent. A trial or an argument could go over to suit the convenience of counsel. But bankers who took large financial commitments in the purchase of securities were subject to the vagaries of the market; their counsel were under constant pressure to conclude the necessary proceedings with the greatest possible dispatch.

The new practice required a different approach. Litigation deals with events of the past. The advocate's duty to his client requires him to cull from existing facts those which support his client's position and so to arrange them as to paint the picture which best suits his client. He must urge that concept of the legal principles involved which will support the client. In handling a security issue, a consolidation or a reorganization, counsel must design a structure to withstand future attack. The exact truth of all present facts must be discovered and the principles of governing law determined, free in each case from color or bias. Whatever may be their personal views or those of the client as to the merits of the relevant decisions of the courts of last resort, or of changing legal concepts foreshadowed by changing personnel of such courts, counsel in a creative corporate matter are more rigidly controlled by those decisions and trends than is any judge sitting in a court of first instance.

The new practice was more lucrative than the old, for usually the clients were realizing large profits from the transactions on which their counsel were serving as legal engineers, and hence were ready to pay higher fees than for services in litigation.

The Corporation Lawyer Is Developed

By the 1890's many of the former great advocates were not only devoting most of their own time to the new corporate practice but had drawn around themselves other lawyers whose abilities lay rather in negotiation in the conference room and in drafting documents than in persuasiveness before the courts. The corporation lawyer had developed, with functions and working habits quite different from those of the advocate.

With the multiplication and expansion of corporations the handling of their legal problems, as well as those of the bankers who served them, required constantly increasing numbers of lawyers. Most of the large corporations, when confronted with new problems, such as those which developed after the federal income tax amendment in 1913, or when the volume of their work increased, did not shop for new lawyers, but consulted counsel already familiar with their affairs, relying on them to find any necessary additional or specialized assistance.

To common law and equity, which constituted the whole law school curriculum for most of us, has been added over the last thirty-five years a mass of federal and state regulatory legislation, interpreted and enforced by a great proliferation of boards, bureaus, commissions and departments, of whose multitudinous and often conflicting rulings we and our clients are presumed to have knowledge. No one human mind could possibly sufficiently encompass all the statutes, regulations and rulings of the Interstate Commerce Commission, the Bureau of Internal Revenue, the Securities and Exchange Commission and the National Labor Relations Board, not to mention all the other federal and state administrative agencies, and at the same time have a sufficiently broad knowledge and experience in common law fundamentals, to give competent advice on all the subjects within the jurisdiction of those agencies. Specialization became inevitable for adequate legal service to business, big or little.

Increase and Variety of Work Changes Law Office Personnel

The increasing amount and variety of work for old clients compelled greatly increased personnel in hundreds of law offices in all our large cities as early as the first decade of this century. By 1920 there were in New York City a score or more of law firms with staffs of at least twenty lawyers each, of whom some were partners and others were employed on salaries. The irreverent dubbed them the "law factories". The Martindale-Hubbell Directory for 1948 lists 284 law firms in the United States

with eight or more partners located in fifty-seven different cities. Seven cities have ten or more such firms, New York seventy-three and Chicago twenty-five. There are ninety-nine firms with twelve or more partners, located in twenty-one cities, thirty-three in New York and fifteen in Chicago. While there is no uniformity of practice as to the number of non-partner lawyers employed by such firms on salaries, in the larger offices it often runs as high as three or four to each partner. The ratio of non-legal clerical personnel to lawyers probably averages about one and one-half to one. New York has law firms with 100 lawyers and total staffs running up to 250.

Many corporations have set up their own legal departments manned by full-time salaried lawyers to handle their day-to-day problems and their contacts with governmental agencies; they consult outside counsel only on more important matters. The derisive have dubbed these corporate legal departments the "kept lawyers". Many rival the "law factories" in size. A large utility holding company in New York has in its parent legal department and that of its New York subsidiary nearly seventy lawyers; an insurance company has a New York legal department of seventy; another, one of fifty-two; an oil company, one of twenty-eight; and a railroad, one of twenty-five.

During the last two decades a large additional group of lawyers has left independent practice for service in the numerous legal departments of Big Government. The federal Department of Justice employs more than 5000 full-time salaried lawyers. Practically every federal agency and department also has its own sizable legal staff; for example, the Bureau of Internal Revenue law department has over 400 lawyers. The law departments of our states and cities also have surprising numbers. The Attorney General's office in the State of New York has about 160 lawyers and the Corporation Counsel's office of New York City about 150.

Big Labor, too, has been developing its army of specialized legal talent, through both retainers of independent practitioners and employment of salaried lawyers to represent the unions in their many proceedings in the courts and administrative bodies and in their growing lobbying and political activities.

It is estimated that there are about 180,000 lawyers in the United States, of whom about 130,000 are primarily engaged in independent practice, either alone or as firm partners, 20,000 are employed by the independent practitioners on a full-time salaried basis, 20,000 are employed by non-legal firms or government units on a salaried basis, other than as judges, and 10,000 are judges. Thus, if the judges be excluded, about three-fourths are in independent practice, while one-eighth are employed by the independent practitioners and one-eighth by non-legal and government units.

Examining the Indictment of the Modern Bar

The great changes which have thus come in the work and methods of our profession are the basis of most of the indictments against our modern Bar. May we now examine some of their specifications, with particular reference to the large offices? Many are so frivolous as to be amusing; others cannot be passed over lightly.

The allegedly "inexpressively ornate and luxurious appointments of the big shops", it is said, betoken the "commercialization" which has supplanted the "professional dignity" of the somber little offices of the good old days. It has been my experience that elaborate decoration is more often found in small offices than in the "law factories". But of what possible professional significance is such a matter of personal taste?

Clients, however, sometimes react strangely to *décor*. A story which went the rounds of downtown New York in the late twenties turned up in a critical magazine article ten years later. In the new multifloored offices of a large firm the soft green walls of the reception hall had just the right number of oil paintings; the lighting was subdued; the rugs were deep-piled; and the managing partner took great pride in the pulchritude of his feminine clerical staff. One day, so the story goes, a brusque but successful oil prospector from Oklahoma came in. As he was kept waiting, he became restless but also interested in the beautiful young stenographers passing through the reception hall to an upper floor. Turning on her most seductive smile, the receptionist asked if she could not get him a drink, assuring him that if he wanted a highball it was available. "Yes," said the client, "I guess I will have a drink, but I don't think I'll go upstairs."

Another of the captious counts in the indictment against large law offices pictures the "youthful barristers . . . coming out of the law schools and plunging into the hoppers and mills of Lex", "scandalously underpaid and exploited", "cruelly overworked through hours that make no distinction between night and day", "losing their fresh alert minds", becoming "suppressed robots on office teams" and leading lives of "monotony", deprived "not only of personal satisfaction in their work but of personal development as well", their only goal—and then only if they have "gilt-edged social connections", perhaps resulting from "strategic marriage"—being attainment of an anonymous junior partnership, overshadowed by an inhuman, driving tycoon-lawyer-businessman.

Exploitation of Young Lawyers Is Baseless Charge

The charge of exploitation can hardly be based on any unfavorable comparison of the neophyte lawyer of today with his predecessor of half a century or more ago. It was not until about the turn of the century that young lawyers serving their apprenticeships received any compensation from their seniors. They had to make their living from such odd jobs as they could pick up and do in the few hours left to them by their

(Continued on page 168)

The Spirit of Laws:

The Doctrine of Separation of Powers

by **George Rossman** • Chief Justice of the Supreme Court of Oregon

■ Montesquieu's *Spirit of Laws*, published two hundred years ago, shaped the thinking of the members of the Constitutional Convention. In this article, Chief Justice Rossman reviews the doctrine of separation of powers as expounded by Montesquieu, and shows how it came to be embodied in the Constitution. The recent trend toward legislation which delegates law-making authority to administrative agencies endangers this classic doctrine of American government, Judge Rossman declares, and he urges that a return to that principle is essential for the preservation of personal freedom.

■ For a thousand years or more while America lay undiscovered and inhabited only by the savages, ancient Athens and Rome dominated the cultural, economic and political thinking of the known world. That long period of time is known as the Ancient Age. It contributed to mankind some of mankind's most notable achievements. With the fall of the Roman Empire there descended upon the world the long period of time known as the Dark Ages. After approximately a thousand years had passed, man renewed his interest in letters and in the sciences, and then began the period known as the Modern Age. It was dominated by the culture and the institutions of Western Europe. One of its brilliant achievements occurred when Columbus sailed westward across the Atlantic and discovered the New World. It seems a paradox that his discovery of America would be followed 460 years later by the termination of the Modern Age. But in recent years there has crossed from the Atlantic to America the leadership in mankind's efforts to improve government, economics and culture. The leadership is now ours. It has shifted to America and the world now looks to us to blaze the way of progress. We of the present generation see the beginning of what Dr. Nicholas Murray Butler terms "the Age of America". Whether we wish it or not, the leadership is now ours.

The Ancient Age which was dominated by ancient Rome and Athens lasted for more than a thousand years. The Modern Age continued for several centuries of time, and I assume that every American is hopeful that his country may be so worthy that its leadership will extend on indefinitely.

Since our nation is destined for untold centuries of time to formulate for mankind the principles governing culture, justice and economics, it may be well for us, the Americans, to look into the mirror and then ask ourselves how faithful we have been to the faith of our fathers which made America free, strong and great. When we look into our family album we see there the doctrine of separation of powers. It occupies a conspicuous place in our family circle. We have always been very proud of it. On the fourth day of July we never fail to laud it as a principle of constitutional government which gives to the American the greatest freedom which the citizen of any land has ever known. We are proud to refer to it as a part of the framework of our government, which gives us a government of checks and balances and which makes ours a government of laws and not of men.

The doctrine of separation of powers is one of the notable achievements of the Modern Age, the age which was dominated by Western Europe. In 1721 there was published anonymously in France a little book entitled the *Persian Letters*. It was written in a style so brilliant and it so effectively satirized the social, political and literary follies of the period that all became interested in discovering the author. Presently it was found that he was a young aristocrat named Montesquieu. He was a member of our profession and was the Chief Justice at Bordeaux. The attention which this book attracted to Montesquieu's literary ability shortly persuaded him to resign his public office and devote himself to a career of letters. In 1748, just 200 years ago, Montesquieu published the volume upon which

Berger Studio

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his fame is principally based, the *Spirit of Laws*. In the *Spirit of Laws* he set forth the doctrine of separation of powers. That doctrine, however, did not originate with Montesquieu. As long ago as ancient Athens, Plato and Aristotle sensed the security to individual freedom that is found in governments which do not entrust all of their powers into single hands. More than two thousand years ago Polybius, the Greek historian, called attention to the inevitable tendency to decay which is manifested in governments which confer all of their powers upon a single element of the populace. He accounted for the vitality of the Roman government and for the strength which enabled it in fifty-three years to conquer the world, by showing that in the Roman government all elements of the citizenry were entrusted with power. He explained that the consuls were monarchial in character, that the senate was aristocratic in its make-up and that the popular assemblies afforded the great masses of the Roman people opportunity to participate in the functioning of the government. Thus, according to him, the monarchial, the aristocratic and the democratic elements all played their part in the operation of the Roman government. Each could check the other and thereby prevent improper exercise of power.

Montesquieu was not interested in the abstract. He sought the law applicable to all forms of government. He was in search of the principle of constitutional law which prevents decay by preserving liberty. In its quest he traveled extensively through Europe. In the course of his journeys he tarried for three years in England where he studied closely the English constitution. He was greatly impressed with it and felt that in England he had found the principle of government which he had been seeking. In his volume, *Spirit of Laws*, he described the English form of government. He showed that the laws of England were made by one organ, that is, Parliament; that the laws were enforced by another organ, the Crown—more particularly by the Crown's ministers. And he showed that the laws were interpreted and applied by still another organ, that is, the judicial branch. His description of the separation of powers by using as an analogy the Constitution of England is one of the valuable features of his book.

Montesquieu's Work And Its Mark on the Constitution

Montesquieu's book was published at a propitious time, and was widely read. When the *Spirit of Laws* appeared democracy was just gaining needed strength. In America, England and France democracy was beginning to command the attention of the new leaders. It was lending cogency to their voices. The *Spirit of Laws* was published just thirty-nine years before our Constitutional Convention convened in Philadelphia. The book commanded the respect of the early Americans who were arguing questions of law and liberty with their British brethren. In an effort to persuade the French-speaking people of Quebec to join with the Colonists in their grievances against the mother country, the Colonists sent to Quebec a printed address consisting largely of quotations from the *Spirit of Laws*. The book was held in high esteem by the leaders of the Constitutional Convention. Washington's copy, like that of Madison, attests through its marginal notations the care with which it was read and studied. In the Constitutional Convention no book was more frequently quoted nor quoted with greater authority than the *Spirit of Laws*. Two of the framers of the Constitution, Hamilton and Madison, together with Jay, who was destined shortly to become our first Chief Justice, wrote a series of articles for the newspapers, later printed together as the *Federalist*, in which they quoted frequently from Montesquieu's volume. In short, the founding fathers were convinced that if the functions of government were separated into their legislative, executive and judicial parts, all three branches of the government would never turn their faces against the rights of the citizen.

Montesquieu's doctrine was accepted without debate by those who wrote our Constitution. It was written into the framework of our government to a greater extent than had been attempted in any similar charter. The doctrine of separation of powers is one of the heritages that has come to us from our Revolutionary forefathers. True to Montesquieu's belief, it has preserved liberty and has prevented decay. Ours is the world's oldest written constitution. The principle of separation of powers, together with the doctrine of judicial supremacy and our dual system of government, state and federal, constitute America's great contributions to the science of government. These three principles are the identifying features of our American form of government. They give to us the greatest freedom that has ever been possessed by the citizens of any land. As a result of them, we have freedom of enterprise and our American way of life. It is to these freedoms that credit must be given in large measure for the high standard of living which has been achieved here in America. Ours is

the highest standard of living that the world has ever known. Freedom of enterprise and our American way of life enabled America during the war to be the arsenal of democracy, and at the present time they are enabling America to be the granary of the world. The doctrine of the separation of powers, I repeat, is one of our great heritages.

Our fathers, in a wondrous age,
Ere yet the Earth was small,
Ensured to us a heritage, and doubted not at all
That we, the children of their heart,
That then did beat so high,
In later time would play like part for our posterity.
Then, fretful murmur not they gave,
So great a charge to keep,
Nor dreamed that awestruck time would save
Their labor while we sleep.
Dear bought and clear a thousand year
Our fathers' title runs.
Make we likewise their sacrifice,
Defrauding not our sons.

But now, can we, "the children of their heart that then did beat so high," say that the principle of separation of powers appears today as luminous in our law books as it did when Montesquieu, a member of our profession, wrote it there two hundred years ago? Is it as forceful and vibrant a factor today in American constitutional law as it was, say, one hundred years ago? Or must we concede that the doctrine is beginning to fade from the pages of our books?

Separation of Powers Should Be More Than a Theory

Elihu Root, about a quarter of a century ago, declared that the doctrine of separation of powers is the first of the great underlying principles of our Constitution which is giving up the struggle and which is beginning to withdraw from the field. Competent students of the science of government declare that they see in present trends the twilight of parliaments.

Justice Oliver Wendell Holmes wrote: "Constitutions are intended to preserve practical and substantial rights, not to maintain theories." Ever since we began to reduce constitutional provisions to writing we have seen a thousand times over that writing constitutional provisions upon parchment does not suffice to preserve them. If they are not to be mere theories, if they are to be vibrant forces in the government of the times, a strong element of society, manifesting a determination that the constitutional provision should be enforced, is essential. Not so long ago we saw all this illustrated once more. This time it occurred in Louisiana with its one-party system. There Huey Long was able to seize control and effect virtually a dictatorship by the expedient of moving the legislators into the administrative offices. The constitution of Louisiana with its doctrine of separation of powers remained, but it was virtually nothing more than a museum piece. We have seen the same thing in Italy, Germany and Russia. Montesquieu showed us that preservation of the various elements of the citizenry is essential to the preservation of our liberty. Each element checks improper efforts of the others to encroach upon freedom. Thereby the tendency to decay is prevented.

The founding fathers believed that our dual system of government would play a part in our system of checks and balances, but we are beginning to see that with the waning authority of the states we are losing one of the elements of our system of checks and balances.

Multiplication of Agencies: A Legislative Abnegation

But it is in the ever-increasing resort to skeleton legislation and in the constant multiplication of administrative agencies that we see the greatest threat to the doctrine of separation of powers. We are all familiar with skeleton legislation. It consists of an act which states a goal which it is hoped can be achieved. In the effort to reach the goal, the law-making branch creates a commission and vests in the commission all three elements of the governmental powers, that is, the judicial, the legislative and the executive powers. The act then gives the commission an appropriation and enjoins upon it the duty to use its power for the achievement of that goal. Generally, there is conferred upon the commission, expressly or by implication, the authority to adjudicate controversies between itself and any citizen arising out of any rule or regulation which it may promulgate. Not infrequently the act which creates the agency goes no further in expressing its standard than to employ words such as "public interest, convenience and necessity". Who can say, when a law goes no further than to say "public interest, convenience and necessity", that an act of legislation has really taken place? Is it not more appropriate to speak of such an instance as being one of legislative abnegation?

As lawyers and as citizens interested in political science, we seek to sustain skeleton legislation by various arguments. One of our favorite ones is to say that the administrative agency does not in truth possess legislative and judicial powers. We go on to explain that the agency possesses only quasi-legislative and quasi-judicial powers. Someone has said that the word "quasi" is the only Latin word which lawyers really love. If the use of the word "quasi" explains the constitutionality of this legislation, then we must add that the word "quasi" is a word which lawyers really respect.

In a recent publication figures were submitted showing that during the 160 years of our nation's existence Congress enacted 66,000 statutes, whereas in the twelve years that the Federal Register has been under publication the Federal administrative agencies promulgated 100,000 rules and regulations having the force of law. The same article showed that all the statutes enacted by Congress in the period 1789 to 1948 have been codified in four volumes known as the United States Code, whereas the 100,000 administrative rules and regulations after having been codified and revised fill forty-seven sizable volumes known as the Code of Federal Regulations. And when one glances over the hundreds of volumes of reports issued by the agencies, he sees that

their judicial output is keeping pace with their legislative output.

We are all familiar with the "hot oil" case and the incident that developed in it which has given currency to the term "hip-pocket jurisprudence". We are also familiar with the "Idaho farmer's" case and his misplaced confidence in crop insurance. These two instances, and hundreds of others which did not make their way into the headlines, develop one of the baffling features of administrative law; that is, that so much of it is not only unknown but unknowable. They also illustrate the trend toward administrative omnipotence.

Lesson of Montesquieu Must Be Relearned

A recent legal publication quotes from Bentham this statement: "We have heard of Tyrants and those cruel ones. But whatever we may have felt, we have never heard of any Tyrant so cruel as to punish men for disobedience to Laws or Orders which he kept them from the knowledge of." Surely we have departed from the spirit of laws as it was understood by those who prepared the framework of our government.

According to a recent report of the Federal Civil Service Commission, there are in the employ of our federal government 2,113,700 civilian employees. The large number of officials, attorneys, experts, investigators and others who constitute the personnel of our administrative agencies is cogent proof of the extent to which we have departed from the doctrine of separation of powers. It is startling to realize that there is an element in our citizenry so strong that it has been able to make the doctrine yield ground. Montesquieu's writings taught us that whenever the various elements lose their equipoise, decay begins to manifest itself.

I shall review data and developments no further. I have shown enough to indicate the marked extent to which we have departed from the principle of separation of powers. This is the 200th anniversary of the publication of *Spirit of Laws*. It is a propitious time for us, the members of the legal profession, to teach those who are unfamiliar with law books and the science of government the lesson that Montesquieu taught us: decay inevitably appears whenever all the functions of government are entrusted to a single element of society or are united in a single organ of government.

The most promising development of recent years was the enactment by Congress in 1946 of the McCarran-Sumners bill, now known as the Federal Administrative Procedure Act. Many term this the most important piece of legislation bearing upon the administration of justice that Congress has adopted since the enactment of the Judiciary Act of 1789. The Federal Administrative Procedure Act gives the office of Examiner a status similar to that possessed by the man on the bench. He cannot be dismissed without cause, and his salary cannot be reduced during his term of office. Nor can he be relegated to the sidelines upon showing independence which offends those who are in powerful positions, for all cases must be assigned to the Examiners in rotation. Here, then, is an act which has gone against current trends. It is a return, to some degree at least, to the doctrine of separation of powers. The enactment of that statute was accomplished with the powerful help of our profession. Its enactment shows the great goals we can reach when we are determined, when we are united and when we make our influence felt.

So far, I have been speaking of things we can do as lawyers. Let me now mention a matter which should concern us as citizens. A disservice was done our country when the term "rugged individual" became one of political derision. The man who can look out for himself is, after all, the backbone of the state. The citizen who supports himself and his family, rather than the one who looks to the state for support, is the one who makes our nation strong and great. By rugged individual, I mean the man who thinks for himself, who is self-reliant and who is resourceful. Of course, there will always be some who, through no fault of theirs, cannot maintain the stride, and for them society must provide adequate assistance. But one of the high purposes of all of our institutions, and of all our schools, colleges and universities must be to make each one of us adequate to the demands of life, to make each capable of taking care of himself. Only in this way can we stop the trend toward the creation of more and more agencies.

> Not gold, but only men
> Can make a people strong and great.
> Men who for truth and honor's sake
> Stand fast and suffer long.
> Brave men, who work while others sleep,
> Who dare, while others fly;
> They build a nation's pillars deep
> And lift them to the sky.

It is people who are self-reliant and who are willing to do more than duty who will make the Age of America a long and brilliant one. Men who are eager to support their government, rather than to have it support them, are the bulwark of the doctrine of separation of powers. And it is only men of that kind who can truthfully join in the beautiful sentiment so well known to us all:

> Long may our land be bright
> With freedom's holy light.

The President and His Office:

A Discussion of Two Recent Books

by **Walter P. Armstrong** • of the Tennessee Bar (Memphis)

■ The review of Dr. Hart's and Professor Corwin's books combined so much of Mr. Armstrong's own delightful, readable style with the absorbing and interesting text reviewed, as to suggest that it deserves treatment as a full-length article. The reviewer has selected for comment, with unerring instinct for matter of timely interest, the growing strength of the President in his relations with the Congress, involving especially foreign affairs, treaty making, and his powers as Commander in Chief. He discusses measures that might wisely be adopted to help toward a better understanding between executive and legislature.

■ These two volumes[1] synchronously published—should be read together. Dr. Hart has written an intensive study of the constitutional beginnings of the Presidency in action as viewed by a political scientist.[2] Professor Corwin in the preface to this third edition[3] of his work defines his central theme as "the development and contemporary status of presidential power and of the presidential office under the Constitution." As Arthur Krock of the New York *Times* points out in his foreword, "Professor Corwin's study is not only the most comprehensive. It is truly a *study*, unlike the work of many others who were more intent on giving their views of what ought to be the functions and scope of the Presidency than on explaining what various Presidents have in fact made, or attempted to make, of them".

Dr. Hart convincingly justifies his detailed examination of the first year of the Presidency by a quotation from Washington: "The first transactions of a nation, like those of an individual upon his first entrance into life, make the deepest impression, and are to form the leading traits in its character."[4]

Holding as he did this view, no aspect of the Presidency was too trivial for Washington's painstaking attention. Being a conscious precedent-maker, he was almost as much concerned with his prerogatives as with his powers.[5] He was, in fact, more cautious in the exercise of his powers than in his insistence upon precedence.

Madison, who was a member of the House, seems to have been Washington's *fidus Achates* in Congress. Washington, however, did not attempt any legislative leadership, although through Madison he allowed his views to become known, as when he mildly endorsed the first ten amendments. He did not express himself as to the other two great achievements of the First Congress: the Judiciary Act and the constitution of the great departments.[6] Administrative drafting did, however, begin with this first session. Washington embodied his own ideas of a plan for the militia in a letter to Secretary of War Knox "to be worked into the form of a Bill".

If the First Congress was not notable for executive leadership, it was significant in another respect. While its legislative product comprised only seventy-six pages this was not only sufficient to set up the new Government, but it was a contemporary construction of the Constitution. One-half of the twenty-two members of the Senate and eight of the fifty-nine members of the House had been framers, and among them were some of the most influential members of the Convention.

1. THE AMERICAN PRESIDENCY IN ACTION, 1789. *By James Hart. New York: The Macmillan Company. 1948. $4.00. Pages xv, 256.*
THE PRESIDENT: OFFICE AND POWERS, 1787-1948. *By Edward S. Corwin. New York: New York University Press. 1948. $6.75. Pages xvii, 552.*

2. Dr. Hart promises "to employ the same method in further studies in the early constitutional history of the Presidency".

3. The earlier editions were published in 1940 and 1941.

4. Professor Corwin covers this same period, though much more briefly. Dr. Hart frequently cites and comments on Professor Corwin's earlier editions.

5. The best-known incident is Washington's insistence that John Hancock, the Governor of Massachusetts, pay his respects before the President accepted an invitation to dine. Cf. Armstrong, Book Review (Herbert S. Allan, *John Hancock: Patriot in Purple* (1948); 34 A.B.A.J. 817, September, 1948.

6. Dr. Hart makes only a passing reference to the Judiciary Act, but discusses at length the constitution of the Cabinet. He devotes much space to "the legislative decision of 1789" which impliedly recognized the constitutional power of the President to remove executive officers. This was the basis of the decision in *Myers v. United States*, 272 U.S. 52 (1926). In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), this power was held not to embrace quasi-judicial officers.

Among a number of constitutional amendments proposed[7] and rejected were three that would have greatly limited the Presidency as it has developed under the Constitution: one would have prohibited a President from serving more than eight years out of twelve; another would have changed the words "to be Commander-in-Chief" to "have power to direct (agreeable to law) the operations of the Army and Navy"; a third would have given the President the right to suspend executive officers for twelve months and have conferred upon Congress power to provide a method of "absolute removal".

Another critical question—almost as important as a constitutional amendment—was about the distribution of the treaty-making and -enforcing power among the President, the Senate and the Congress. The debate—although brief—made it apparent that the Convention on this as on many other subjects had expressed no illuminating opinion.

Dr. Hart in showing how these questions emerged arouses a reader interest which Professor Corwin in many instances satisfies; for not a few of them have been settled—usually settled by usage because of the Court's reluctance to enter the political field.[8]

Space is not available either to synopsize or comment at any length upon Professor Corwin's detailed exegesis. The exposition is well balanced, although appropriately enough in the allocation of space timely topics are favored. Indeed, the rapid change of emphasis is in itself a complete justification for a new, revised and enlarged edition. About eighty pages of text have been added. Among the topics discussed for the first time, or which, since the earlier editions, have been thrust into greater prominence, are the reeligibility of the President; the order of succession; the President's role in foreign affairs, including "the declension of the role of formal treaty-making in face of the 'executive agreement' device; the enlarged role of Congress in the foreign relations field under the United Nations Participation Act of December 20, 1945; the vastly expanded role of the President as 'Commander-in-Chief in time leader.

Power of President Has Increased

However, events move so rapidly that no book can be contemporaneous. The last election has already outmoded Professor Corwin's discussion of the President as legislative leader.

Professor Corwin views the development of the Presidency as a struggle for power between the President and Congress in which the President has gradually gained the ascendancy.[9] Although the latitudinarian construction of the Constitution which has now prevailed for almost a decade and a half has been largely an enlargement of the scope for federal legislation, much of this augmented federalism is exercised by the President rather than by Congress.

The power of the Presidency has been increased both by removing threats that handicapped it and by adding supports that strengthen it. A changed conception of the office has caused the President to be considered as the one representative of the whole people.

Professor Corwin points out that as a result of "the Congressional Caucus", "for twenty years the plan rejected by the Framers, of having the President chosen by Congress, was substantially in operation." The Presidents of that era counted the votes of the heads of departments as of equal weight with their own and expected only slight deference from Congress. Jackson's reputation and imperious personality and the nominating convention[10] broke the spell and set the stage for an appeal to the people over the head of Congress.

Lincoln's augmentation of the power of his office did not follow the Jacksonian pattern. Lincoln considered Congress as somewhat of a nuisance and without reference to it exercised his war power as Commander in Chief.

The setback under Johnson was temporary. Congressional Reconstruction did not eventually weaken the office. The Supreme Court denied to itself the power to supervise the President's political acts[11]; not only did the impeachment fail, but the theory advanced by the House managers that the Senate had the power to remove regardless of high crimes and misdemeanors was not seriously considered.[12] While Johnson's counsel contented themselves with insisting that the President acted in good faith in violating the Tenure of Office Act, eventually the Supreme Court vindicated Johnson's conten-

7. The framers did not regard the Constitution as a definitive document; they envisaged the possibility of numerous amendments but did not foresee the freedom with which the Court has construed it in different ways at different times. The reluctance to adopt formal amendments and the easy acquiescence in judicial construction developed much later.

8. Both Dr. Hart and Professor Corwin have fully documented their studies. Dr. Hart, almost exclusively, cites but infrequently quotes archived records; for him no judicial opinions were available; the Supreme Court had not been organized by the end of 1789. Professor Corwin, on the other hand, had available and uses many court opinions from which, as from his other authorities, he quotes at so great length that his annotations comprise almost 150 pages. Curiously enough, Professor Corwin, in support of his relation of the proceedings of Congress, relies upon the New York *Times* rather than upon the *Congressional Record*. This is a deserved compliment to the *Times* but not an entirely warranted reflection on the *Record*.

Most surprising is Professor Corwin's documentation of his discussion of *stare decisis*. He quotes in full a "letter to the editor" of the *Times* and ignores the many authoritative full-dress discussions of the subject. Cf. Curtis, *Lions Under the Throne*; Pritchett, *The Roosevelt Court*; Palmer's articles in 34 A.B.A.J. 677, 761, 887; August, September and October, 1948. I yield only to Professor Corwin in my admiration of the *Times*; I am not prepared to go this far.

9. Theodore Roosevelt advanced "the stewardship theory"—that the President possessed all executive power not expressly prohibited. This theory has almost been accepted.

10. The decadence of the Electoral College was another factor. As the custom grew for electors merely to register the votes of their states for convention nominees, the election of the President became more nearly a popular choice. This will be accentuated if the plan suggested by Senator Lodge is adopted. Under this proposed amendment, the Electoral College would be retained but in every state each candidate would receive the same proportion of electoral as of popular votes. It would still be possible for a President to be elected without receiving a majority of the popular votes. This possibility results from the fact that the electoral vote of each state (regardless of population) is weighted by two electors. Such a result, however, is extremely unlikely.

11. *Mississippi* v. *Johnson*, 4 Wall. 475 (U.S., 1867).

12. This theory had been advanced earlier in the impeachment of Justice Chase.

tion that it was unconstitutional.[13] So well established has the right of removal become that there is not much doubt that it extends to the entire non-judicial administrative field—even that within the specifically delegated powers of Congress.

In the two World Wars the power of the President as Commander in Chief greatly increased, although—unlike Lincoln—both Woodrow Wilson and Franklin D. Roosevelt sought and obtained the cooperation of Congress.[14]

President Has Assumed Role of Legislative Leader

In foreign affairs the growth of Presidential power has been comparable to that of the war power. It has come to be recognized that in this field there is inherent authority. Executive agreements have deprived the Senate of much of its power in treaty-making, and are concededly binding on succeeding administrations. Even the Senate's greatest success—the defeat of the Versailles Treaty—was a Pyrrhic victory, for nothing has ever done more to lower its prestige.

Finally, Congress, unable properly to organize itself and incapable of developing within itself any national leadership, has enormously enhanced the power of the Presidency by its delegation of its legislative powers to the President—a delegation which the present Supreme Court consistently upholds.[15]

In our time the most significant role of the President has become that of legislative leader; certainly in no other aspect of the office has there been a greater change. To this change many factors have contributed. Among them are the lessened influence of members of Congress in the nomination of candidates; the generally held conception that the President is the only official elected by and responsible to the whole people; the glamour and prestige of the office constantly and conspicuously emphasized; the lack of leadership in Congress; the use of the veto for the purpose of promoting as well as killing legislation[16]; the vast increase in the patronage at the President's disposal[17]; the perfection of the methods of mass communication—especially the radio, which enables the President to chat with all his constituents.

In the past political scientists have held that this power of legislative leadership depended almost entirely upon the personality of the President—that only strong Presidents could successfully attempt it. Professor Corwin's comment (written before the recent election) is: "The present-day role of the President as policy determiner in the legislative field is largely the creation of the two Roosevelts and Woodrow Wilson." Without combating the view that Presidential leadership in legislation is the product of these "strong" Presidents it can be plausibly maintained that the instrument has been so nearly perfected that it is a powerful weapon in the hands of any President who cares to use it.

Mr. Truman succeeded where both Woodrow Wilson and Franklin D. Roosevelt failed. Woodrow Wilson's appeal for a Democratic Congress in 1918 was disastrous to himself and to his party. Franklin D. Roosevelt's attempted "purge" was a fiasco. Mr. Truman, going to the country under less favorable conditions[18] attacked the Eightieth as the worst Congress in the nation's history—except only the one that was responsible for Reconstruction—and the people responded by returning him and a Congress of the complexion he demanded.

Although Mr. Truman succeeded where his two predecessors failed, it is yet possible that he may fail where they succeeded. They failed when they sought to arouse the people against Congress. Generally they succeeded—by words of persuasion and hints of force—in having their respective ways with Congress. Mr. Truman succeeded in arraying the voters against Congress but will he succeed in bending to his will the Congress for whose election he is largely responsible? Here is a new problem in Presidential leadership.

Professor Corwin Favors Legislative Council

This unforeseen development of Presidential leadership does not subject Professor Corwin to criticism but it does suggest that he has underemphasized the power that today has come to inhere in the office and that he has been too much inclined to the view that in the future as in the past the influence of the Presidency will be dependent upon the personality of the incumbent. Perhaps it is for this reason that he seems to accept the view that the struggle for power between the President and Congress will continue[19] and makes so few suggestions for coordinating the executive and legislative departments.

Indeed, he makes but one suggestion for improvement. He rejects the principle of the Kefauver Resolution, which would give Cabinet members seats in the House and Senate and the right to participate in debate and the obligation to im-

13. *Myers v. United States*, 272 U.S. 52 (1926).

14. The Supreme Court curiously enough has found that only in acting as Commander in Chief has any recent President exceeded his authority. *Duncan v. Kahanamoku, Sheriff*, 327 U.S. 304 (1946), holding invalid martial law in Hawaii.

15. Professor Corwin writes: "One of the most sweeping delegations of power ever made by Congress was to the Supreme Court itself, by the Act of June 19, 1934, to regulate civil proceedings in the district courts of the United States." This overlooks the fact that their rule-making power is essentially a judicial, not a legislative function.

16. At one time it was insisted by a responsible segment of opinion that the veto should not be used by the President except on legislation deemed unconstitutional, or to protect the prerogatives of his office.

17. This cuts two ways. To appoint one is to disappoint many. President Taft said that whenever he appointed to office he made one ingrate and ten enemies. Louis XIV and John Adams had put the proportion one to a hundred. But if the appointment is made at the behest of a Representative or Senator presumably the Congressman will have that gratitude which is a lively expectation of favors yet to come.

18. Because of the fact that the Wallace and States Rights tickets drew from his potential votes.

19. If this is to be, we might consider providing for the President and the Congressional majority equal radio time for addressing the people. Cf. Armstrong review of *Government and Mass Communications*, by Zechariah Chafee, Jr., 20 *Tenn. L. Rev.* 305 (1948).

part information[20]; instead he proposes that "the President shall construct his Cabinet from a joint Legislative Council to be created by the two houses of Congress and to contain its leading members."[21]

Although Professor Corwin does not expressly so state, presumably the members of the Cabinet so constituted would be members of the President's party. If that party is in a minority in Congress it is difficult to see how such a Cabinet could effectively forward administrative measures.[22] Certainly here is no solution of the problem of deadlock between the President and Congress. Dr. Hart's remedy for the deadlock is "to make the terms of Senate, House and President coincide."

These are such part-way measures that it might be said that while both Dr. Hart and Professor Corwin have by their studies emphatically pointed up the need of bettering our system, neither has offered any real solution. This is true of many other writers who have tackled the subject. One difficulty seems to be the fear of a violent reaction if anyone has the temerity to profane the ark of the covenant by suggesting that we have anything to learn from the parliamentary government. Almost everyone who makes a suggestion for change is careful to state that his proposal is not in any way based upon that system. I cannot believe that such formal obeisance to Anglophobia is necessary.[23]

Another objection to most of the proposals is their lack of comprehensiveness. There is usually merely a timid attack upon one position. Now the time is propitious for a general advance. Two facts are obvious: The voters have come to look to the President as their legislative leader[24]; Congress has the power to render that leadership ineffective. Is there a solution, or if not a complete, at least a partial solution?

After selecting from and adding to the proposals advanced I believe that careful consideration may well be given to the following changes: The adoption of the constitutional amendment proposed by Senator Fulbright which would make the terms of the President, of Representatives and of Senators coincide and give to the President or Congress the power to call a new national election. The selection by the President of a Cabinet of political advisers rather than administrators—the members to have seats (with the right of debate) in both Houses. The dropping of the proposed amendment to the Constitution limiting the re-eligibility of the President. The adoption of the Lodge plan of distributing the electoral votes. A constitutional amendment depriving the House of the right to impeach and the Senate of the power to try and to remove the President. Another amendment providing for the ratification of treaties by a majority vote of each House.

A combination of the Kefauver Resolution and the Fulbright Amendment does not necessarily offer a full solution of the problem of deadlock. Cabinet members may sit and speak in Congress as authentic representatives of the President without measurably influencing legislation. A new national election will not of itself break a deadlock. Conceivably the same President and the same majority in Congress may be returned and another deadlock ensue. However, this is about as near a solution as we can come without plumping for the parliamentary system.

The other suggestions are cognate. A limit upon re-eligibility is incompatible with constitutional recognition of the President as legislative leader.[25] The Lodge plan approaches popular election of the President without lessening the vote of any state in the Electoral College. The power to impeach and try is a potential weapon against the President in the hands of Congress. True, in the Chase and Johnson impeachments it was agreed that the accused must be found guilty of a high crime or misdemeanor. However, it does not follow that these precedents will be consistently followed. Moreover, if the Fulbright Amendment is adopted Congress can have the Presidents tried by the people.

Conferring upon Congress the power to ratify treaties would bring the Constitution in line with practicability. Most treaties and executive agreements require implementation by legislation. Later legislation supersedes a treaty. Ratification by the Senate is circumvented by the executive agreement device and by the concurrent resolution.[26] In short, no treaty is effective without Congressional consent. It follows that every treaty should be effective with this consent.[27]

If these or any comprehensive suggestions are considered the studies of Dr. Hart and Professor Corwin will prove invaluable background and requisite source material.[28]

20. Dr. Hart writes: "The present writer is strongly of opinion, however, that such a plan would be a dangerous venture."

21. Professor Corwin has elaborated this proposal in a recent article. *New York Times Magazine*: "Wanted: A New Type of Cabinet", October 10, 1948.

22. Professor Corwin's answer is that such a "situation has obtained comparatively rarely—only four times since the turn of the century, covering eight years out of forty-eight." However, when it does occur it is pregnant with the possibility of disaster.

23. Those familiar with parliamentary government are also skeptical of presidential government. Cf. George Bernard Shaw's amusing play *Apple Cart*, in which a constitutional king, to thwart his ministers, threatened to abdicate and stand for election in the House of Commons.

24. A recent phase of this legislative leadership is the President's message construing a bill which he signs. Shall this be considered by the Supreme Court as a legislative act when the law is to be interpreted?

25. Britain did not suffer when Gladstone was Prime Minister for twelve years or Walpole for twenty years; nor did Canada by Mackenzie King's Prime Ministership of over twenty years.

26. Texas and Hawaii were annexed and the war with the Central Powers terminated by concurrent resolution.

27. The powers and duties of the Vice President might well be revised. Throttlebottom is a completely inadequate role for one of the demonstrated capacity of Mr. Barkley.

28. For other discussions bearing on the subject see: *The American Presidency*, by Harold J. Laski; *This is Congress*, by Roland Young; *Strengthening the Congress*, by Robert Heller, reviewed by Armstrong in 31 *A.B.A.J.* 188, April, 1945; *Can Representative Government Do the Job?* by Thomas K. Finletter, reviewed by Armstrong in 31 *A.B.A.J.* 241, May, 1945; *Growth of Constitutional Power in the United States*, by Carl Brent Swisher, reviewed by Armstrong in 32 *A.B.A.J.* 333, June, 1946; *Congress at the Crossroads*, by George B. Galloway; *A Twentieth Century Congress*, by Estes Kefauver and Jack Levin, reviewed by Armstrong in 33 A.B.A.J. 675, July, 1947; *The President and The Congress*, by Wilfred E. Binkley, reviewed by Armstrong in 33 *A.B.A.J.* 417, May, 1947; *Presidential Government in the United States*, by C. Perry Patterson, reviewed by Armstrong in 33 *A.B.A.J.* 919, September, 1947; "The Kefauver Resolution", by Armstrong, 30 *A.B.A.J.* 326, June, 1944.

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The Court and the Popular Will:

What Is Their True Function in Our Legal System?

By **Ben W. Palmer** • of the Minnesota Bar (Minneapolis)

■ In this installment of his study of the causes of dissents and reversals in the Supreme Court of the United States, Mr. Palmer discusses "The Court and the Popular Will". This raises two very fundamental questions: What is the true function of the Court? And what should be the influence of popular opinion? Mr. Palmer discusses them with the same insight detachment and thoroughness that has characterized all his work.

At the time of the publication of the first of this series of discussions last July (34 A.B.A.J. 554) it was thought that the eighth would be the last, but the interest and discussion which these articles have evoked, prompted the editors to ask Mr. Palmer to summarize briefly his points and his conclusions for publication in our March issue.

■ The present difficulty in the Court is more than a disagreement as to the ends of law, as to the kind of socio-economic legal order we should have or a reflection of the confusion of thought in the world outside. It may also be caused by disagreement among the justices as to what they think the people want, and as to when, to what extent and with regard to what subjects they should carry out the will of the majority at any time.

No one would quarrel, we would suppose, with Justice Frankfurter's statement[1] that "The Court has no reason for existence if it merely reflects the pressures of the day", nor perhaps with Justice Sutherland's, when Senator,[2] that "a judge has no constituents". Hamilton in Number 78 of the *Federalist* says: "This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which acts of designing men, or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government and serious oppressions of the minor party in the community." And again, he says:

> It is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act.

Here it is laid down plainly: even if a justice *knew* that a majority of the people, and not simply a majority of the Congress, wanted specific legislation, he would not thereby be justified in declaring it valid. But the question is whether and to what extent Hamilton's doctrine has been approved and followed.

Woodrow Wilson in 1908 wrote:[3]

> What we should ask of our judges is that they prove themselves such men as can discriminate between the opinion of the moment and the opinion of the age, between the opinion which springs a legitimate essence, from the enlightened judgment of men of thought and good conscience, and the opinion of desire, of self-interest, of impulse and impatience.

This is a large order indeed. It bristles so with difficulties and the ascertainment and weighing of intangibles that one would wonder what justice would be temerarious enough to try to draw the line between "the opinion of the moment" and "the opinion of the age". How is he to define or demark the limit of "an age"? How may he determine

1. Dissenting in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 665, 63 S. Ct. 1178, 1197 (1943).
2. Speaking while a United States Senator, 47 Cong. Rec. 2801 (1911).
3. Woodrow Wilson, *Congressional Government in the United States* (1908) 165.

when judgment is "enlightened", just who are men "of thought and good conscience", what is the "opinion of desire" or of "self-interest", when the result of "impulse" or "impatience"? Wilson's great enemy, Theodore Roosevelt, drew a similar line of difficulty for the judges when he said[4] "Judges should represent 'the permanent popular will'" (note the relative term, what is "permanent"?) But "a judge cannot be a good judge . . . if he is required to render every decision in accordance with what popular opinion at the moment, with or without reason, may desire".

Should the Court Disregard the People's Will?

The argument for and against regard for the popular will became explicit in the income tax cases. James C. Carter, approaching the close of his argument for the act said:[5] "Nothing could be more unwise and dangerous—nothing more foreign to the spirit of the Constitution—than an attempt to baffle and defeat a popular determination by a judgment in a lawsuit. When the opposing forces of sixty millions of people have become arrayed in hostile political ranks upon a question which all men feel is not a question of law, but of legislation, the only path of safety is to accept the voice of the majority as final."

Joseph H. Choate met this argument head on in reply: "If it be true, as my learned friend said in closing, that the passions of the people are aroused on this subject, if it be true that a mighty army of sixty million citizens is likely to be incensed by this decision, it is the more vital to the future welfare of this country that this court again resolutely and courageously declare, as Marshall did, that it has the power to set aside an act of Congress violative of the Constitution, and that it will not hesitate in exerting that power, no matter what the threatened consequences of popular or populistic wrath may be". The majority of the Court agreed with Choate.

After President Wilson had welcomed the American Bar Association to Washington in 1914,[6] Hampton L. Carson, speaking at the Annual Dinner and with the members of the Supreme Court present said:[7] "The President of the United States in his address of welcome to the Association suggested . . . that the judges should extract from the atmosphere about them a subtle something, a natural equity, a roving sense of justice and breathe it into their decisions. So far as the thought implies a lofty purpose to promote justice . . . the court and the bar will heartily respond. . . . But if it implies that the judges are at liberty to disregard fixed principles and substitute an undefined and intangible popular apprehension of what a decision ought to be, which will vary with the sensitiveness of each individual judge, then the doctrine is full of peril". As William L. Ransom, President of the American Bar Association put it:[8] "If judges on the bench are to bow weakly to supposed popular demands for the breaking down of the rights of some citizens in order to favor other citizens, then constitutional safeguards become of no avail. . . . If the judge on the bench makes a hodge-podge of human rights in order to serve supposed social ends the 'blessings of liberty' are to that extent forfeit".

Notion of *Zeitgeist* Leads to Two Great Battles

Against these words may be set the often quoted words of Justice Holmes in 1911[9] that the police power "may be put forth in aid of what is held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare". So Edward S. Corwin, with his sympathetic attitude towards President Franklin Roosevelt's point of view with respect to the Court, wrote in 1938:[10] "In the long run the majority must

4. 97 *Outlook* 384-385 (1911). Justice Stone in 50 *Harv. L. Rev.* 25 (1936) says: "The judge whose decision may control government action . . . must ever be alert to discover . . . whether his own or the objective standard will represent the sober second thought of the community, which is the firm base on which all law must ultimately rest." See also 46 *Col. L. Rev.* 764, 799 (1946).

5. *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 15 S. Ct. 912, 39 L. ed. 1108 (1895).

6. See *Rosen* v. *United States*, 245 U. S. 465, 471, 38 S. Ct. 148, 150, 62 L. ed. 406 (1918) on the trend of legislative opinion as supporting change in the old common law rule. President Wilson, speaking to the American Bar Association at Washington in 1914, said: "There was a time when the thoughtful eye of the judge rested upon the changes of social circumstances and almost palpably saw the law arise out of human life. Have we got to a time when the only way to change law is by statute? The changing of law by statute seems to me like mending a garment with a patch; whereas law should grow by the life that is in it, not by the life that is outside of it. . . . I should hate to think that the law was based entirely upon 'has-beens' . . . that the law did not derive its impulse from looking forward rather than . . . backward, or rather, that it did not derive its instruction from looking about and seeing what the circumstances of man actually are, and what the impulses of justice necessarily are." 39 A.B.A. Rep. 7-8 (1914). For comments of Hampton L. Carson see *id.* 113. Conservative though Justice Sutherland was, as Senator he said: "precedent after all is not a fixed pathway, it is only the opinion of a former traveller as to where the pathway should be". 37 *id.* 386 (1912).

7. 39 *id.* 113 (1914).

8. William L. Ransom, Address to the American Bar Association at Boston, 61 *id.* 393 (1936).

9. Theodore Roosevelt, quoting Holmes in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 S. Ct. 186, 55 L. ed. 112, 32 L.R.A.N.S. 1062 (1911) in 97 *Outlook* 574 (1911). On Holmes and due process, see Hamilton Vreeland, Jr., *Twilight of Individual Liberty* (1944) *passim*. See also *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940, 89 A.L.R. 1469 (1934).

10. Corwin, *Court over Constitution* (1938) 127. The italics and exclamation point are Corwin's. An editorial in 17 *World Tomorrow* 123 (1934) said: "Public opinion determines, in the end, what the majority of the Court says. At the moment the Court is in the mood to uphold the New Deal. If public opinion shifts strongly to the left, the Court will probably validate Socialist legislation. . . . Radicals bent upon pacific revolution should rejoice over the fact that the Court follows the election returns . . . and, while rejoicing, continue to agitate, educate, organize!" Justice Frankfurter, with Henry M. Hart, Jr., disliked the shallow imputation of Mr. Dooley's oft-quoted words "th' supreme court follows th' iliction returns", but says, "Subtly the impregnating intellectual climate of an era also affects the Court". 48 *Harv. L. Rev.* 238 (1934). President Roosevelt's proposal to reorganize the Court, made February 5, 1937, preceded the *Jones & Laughlin* case by about ten weeks. Corwin in his *Constitutional Revolution, Ltd.* (1941) thinks that more important than the court-packing proposal was the 1936 election "manifesting overwhelming popular approval of the New Deal; and the CIO strikes in Detroit, and the apparent helplessness of the state government to deal with them, at any rate without precipitating something like civil war" (page 73). At page 76, he says: "Justice Stone's relentless insistence in argument, the Chief Justice's political skill and Justice Roberts's eagerness for the light—these were the chief inter-curial factors in bringing about the Court's reversal of position on the New Deal." As to the court-packing plan, one columnist said "a switch in time saved nine". (Quoted by Corwin, *id.*, 72). But see Walter F. Dodd in 41 *Am. Pol. Sci. Rev.* 4 (1947): "There is no basis for the assertion that favorable opinions by the Court from January to June, 1937, were occasioned by the President's action." On the New Deal and the Court generally, see Carl B. Swisher, *American Constitutional Development* (1943) 875 *et seq.*; C. Herman Pritchett, *The Roosevelt Court* (1948); Swisher, *Growth of Constitutional Power in the United States* (1946) 210, *et seq.*

have its way, and *the run must not be too long either!*" If the Court is to consider opinion in order to determine whether it is "strong prevalent" or represents "sober second thought" rather than passing whim, it is embarked upon a hazardous undertaking. Justice Cardozo has written:[11] "My duty as Judge may be to objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of the men and women of my time."[12] "I have no quarrel . . . with the doctrine that judges ought to be in sympathy with the spirit of their times." But, he continues: "Alas! assent to such a generality does not carry us far upon the road to truth. In every court there are likely to be as many estimates of the *Zeitgeist* as there are judges on its bench." And so we raise here the question whether to some extent the present unprecedented dissension in the Court may not be due to the effort of some of the Justices to find out what the *Zeitgeist* is and pay heed to it in their opinions.

The great question as to what extent if any the courts in constitutional cases should pay attention to the popular will was at the center of the two great popular battles about the judiciary: the recall of judges and of judicial decisions, and President Roosevelt's proposal to pack the Court.

Theodore Roosevelt wrote:[13] "It is the people and not the judges who are entitled to say what their constitution means, for the constitution is theirs, it belongs to them and not to their servants in office." So too he said:[14] "When a judge decides a Constitutional question, when he decides what the people as a whole can or cannot do, the people should have the right to recall the decision if they think it wrong." And William L. Ransom, though limiting his support of recall of judicial decisions to state court denials of state police power and explicitly leaving out the United States Supreme Court, favored[15] "the deliberate demand of the people that, on the question of what their government may and should do for the amelioration of social or economic needs . . . the mature sentiment of the majority of the people" should "prevail, if need be, against what a court may think the majority of the people think, or ought to think, should be done."

Senator Borah, opposing Theodore Roosevelt's proposal, said:[16] "If our courts are taught to listen, trained by this subtle process of the years to hearken to the voice of the majority, to whom will the minority appeal for relief. . . . The people's courts can no more survive the demoralizing effect of the vices of majorities in the administration of justice than the king's courts could stand against the influence of their masters." But with Borah, as with Theodore Roosevelt and many others, the difference between short term or temporary gusts of popular will, and long term, considered preponderant judgment bobbed up again. For he said:[17] "They [the courts] will not always be abreast of the most advanced opinions in the march of progress, but that they will in due time mortise and build into our jurisprudence all that is permanent and wise and just, all that a settled and digested public opinion finally indorses no one familiar with the history of our jurisprudence can for a moment doubt."

Court-Packing Plan Stirs Up the Argument Anew

Like Theodore Roosevelt's recall of judicial decisions, but much more explosively, Franklin Roosevelt's court reorganization proposal squarely raised the question of the responsiveness of the judiciary to the popular will. Supporters of the President's program argued that its purpose was merely the properly democratic one of carrying out a popular mandate expressed vehemently in the 1936 election.[18] They used many of the arguments used by those who had advocated the recall of judicial decisions. Like many of these they took the position that the amending process was too slow, and that a hostile court might emasculate any

11. Cardozo, *Nature of the Judicial Process* (1921) 173.

12. *Id.* 174. Of course, he was not here speaking specifically of constitutional law.

13. In his introduction to William L. Ransom, *Majority Rule and the Judiciary* (1912) 6. For Judge Ransom's vigorous opposition to Franklin Roosevelt's court-packing proposal, see his speech at Boston, August 24, 1936, which is quoted by him as affirmation of his convictions in 23 A.B.A.J. 277 (1937).

14. 100 *Outlook* 390-402 (1912). See Theodore Roosevelt, *id.* at 618-626, an address at Carnegie Hall wherein he quoted Holmes in the *Noble Bank* case *(supra,* n. 9); 197 *Outlook* 384-385, 488-492, 532-536, 574-577 (1911). As to Holmes, however, see *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393 (1922), where he wrote, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the damage". For Cardozo's quotation of Theodore Roosevelt on a judges' point of view, see Cardozo, *op. cit.,* 171.

15. William L. Ransom, *op. cit.* 39, *supra, n. 13.* He adds in italics: "The present agitation is an effort to make the persistent sentiment of the preponderant majority of the people the ultimate and effective factor in determining the scope of the altogether elastic policy or regulative power of state governments". At page 169, he quotes the New York *Times:* "That the definite will of the majority of the voters, deliberately formed, consistently adhered to and fairly expressed, should determine the treatment of public affairs in all branches, even the *judiciary* is the fundamental principle of democracy".

16. Speech in the Senate August 7, 1911, reprinted in part in his *American Problems* (1924) 171, 177.

17. Speech in the Senate August 19, 1914. See his *American Problems (1924)* 182. For recall of judicial decisions, see Donald R. Richberg, 52 *Annals Am. Academy Pol. and Soc. Sci.* 25-36 (1914), (quoting Holmes in the *Noble Bank* case); William Draper Lewis, 43 *id.* 311-325 (1914), making the same quotation. Against recall of judicial decisions, see a veto message of President Taft, 48 Richardson, *Messages and Papers of the Presidents* 8019: "In a proper sense, judges are servants of the people; that is, they are doing work which must be done for the Government and in the interest of all the people, but it is not work in the doing of which they are to follow the will of the majority except as that is embodied in statutes lawfully enacted according to constitutional limitations". But later in the same message, Taft said: ". . . It is impossible to prevent the influence of popular opinion from coloring judgments in the long run. . . . There will be found a response to sober popular opinion as it changes to meet the exigency of social, political, and economic changes". For Sutherland's views, see 9 *Great Debates in American History* (1913) 533; 47 *Cong. Rec.* 2793, 2801; *Sen. Doc. No. 978,* 62d Cong., 3d Sess. (1912); Elihu Root, 35 *N. Y. State Bar Assn. Proc.* 148-167 (1912); 47 *Cong. Rec.* 3691; William B. Hornblower, 22 *Yale L. Jour.* 1-18 (1912); Henry W. Taft, *Occasional Papers and Addresses* (1920) 219-252; Rome G. Brown, 43 *Annals* 239-277 (1912); *Sen. Doc. No.* 649, 842, 892, 62d Cong., 2d Sess. (1912); *Sen. Doc. No.* 983, 62d Cong., 3d Sess. (1913); Hornblower, in *Sen. Doc. No.* 1052, 62d Cong., 3d Sess. (1913); bibliography, 38 A.B.A. Rep. 579-604 (1913); 39 *id.* 607-621 (1914); Theodore Roosevelt, quoted in Frankfurter, *Law and Politics* (1939) 15: "I may not know much about law, but I do know one can put the fear of God into judges." Of course, the whole subject of the courts and the popular will is related to the debate about an elective judiciary.

18. See, for example Robert H. Jackson, *The Struggle for Judicial Supremacy* (1941) 177: "The

amendment by perverted interpretation.[19] This was to overlook the very purpose of the amending process. The definite amending process was designed to cut the gordian knot of discussion about the precise line between temporary majority desires which are not necessarily to govern, and the sober second thought of the "preponderant majority" which in the long run may rule. But may not some justices perhaps believe that the amending process is too slow, that the *Zeitgeist* or a popular electoral mandate should largely govern, and that the Court should be a continuing constitutional convention?

Furthermore the question may be raised as to possible unconscious yielding to some extent to the present world-wide trend toward a totalitarian state, at least in economic matters. For even before World War I there were those in America who frankly regarded as superior to the American constitutional system with its checks and balances, the English system with its omnipotent parliament that can do anything but "change a man into a woman". Then came the concept of a welfare state, or a "classless" state under the dictatorship of the proletariat, or of a state organized for the equalization of wealth, or, as some less radical desired, for greater equality of opportunity. The humanitarian movement for social justice, the greater need for law as a result of the urbanization of society, the iron necessities of government control in two world wars, all contributed to increase governmental powers. The comparative poverty of some states in the face of growing federal revenues, particularly from the income tax, the drawing together of people in a continent shrunk by modern transportation and communication, of a people on wheels, caused many to turn to the federal government for aid. Organized pressure groups found it easier to concentrate their lobbies and propaganda machines on one wealthy government in Washington than on forty-eight scattered states, some financially weak. The need of national highways for commerce and defense impelled movements upon the national treasury. And pragmatic admirers of efficiency were not slow to accelerate the shift. Those who stood for a planned economy or a cooperative commonwealth or a socialized society concentrated upon the nation's capital.

The *Zeitgeist* Theory Opposed to Natural Law

This is not to argue that the shift was entirely wrong, or solely the result of propaganda by social planners or socialists or communists. That is not the matter for discussion here. The sole point, recognized by all, is that the shift had occurred. And whether the desire be temporary or "digested and long run", that of merely organized vocal minorities or "preponderant majority", what are the justices to conclude? Certainly many of those who would use all the power of the national government to change the economic structure of society believe that law is command and force, not reason, believe in a jurisprudence of "interests" in a crassly material sense, that there are no such things as "rights", that what the majority desires, or those purporting to represent the majority desire, should be law. And if this requires "flexible logic", or "logic of consequences" in order to overcome constitutional obstacles, that logic must be freely brought into play by the justices of the Supreme Court of the United States.

Many of those who have this philosophy use every effort to confuse the public. They give their opponents who stand for absolute principles of natural law and for a sincere and practical protection of constitutional rights a bad name. They brand them as enemies of democracy, as if there could be no such possible thing as a totalitarian democracy.[20] This of course is to lose sight of the simple fact that it is immaterial from the standpoint of the individual or the minority whether his or their rights are destroyed by a single dictator or *fuehrer*, a ruthless minority or a democratic majority in a continental democracy of one hundred and forty millions.[21]

(Continued on page 171)

election had gone against the Court quite as emphatically as against the Republican Party, whose bedfellow it had been"; at 321: "either the election was only a mirage to winning progressive forces or the Court must yield". President Roosevelt, in a radio address March 9, 1937, printed in Jackson, *op. cit.* 345: "We must have judges who will bring to the courts a present-day sense of the Constitution". At 347, the President said, "If by the phrase court-packing the charge is made that I would appoint . . . justices who will not undertake to override the judgment of the Congress on legislative policy . . . that I will appoint Justices who will act as Justices and not as legislators . . . then I say that I . . . favor doing just that thing—now". For comment of Frederick H. Stinchfield on this, see 23 A.B.A.J. 233 (1937). For the President's message of February 5, 1937, transmitting his proposed bill, see 81 Cong. Rec. 877-879, *H. R. Doc. No. 142*, 75th Cong., 1st Sess., Part I (1937); for the message of January 6, 1937, see *Newsweek*, March 13, 1937, page 8. For Senator Black's support of the bill, see 81 Cong. Rec. 9, 1292, 2827, 2836, App. 224, 306; 23 A.B.A.J. 578 (1937); New York *Times*, March 1, 1937, page 1, column 1. For Robert H. Jackson's views, see Julia E. Johnsen, *Reorganization of the Supreme Court* (1937) 174, 179, 187, and Jackson's *The Struggle for Judicial Supremacy*, *supra*; New York *Times*, March 25, 1937, page 21, column 1; *Hearings before Committee on the Judiciary on Sen. 1392, 75th Cong., 1st Sess.* (1937) 37-65 (referred to hereafter as *Hearings*). For Stanley Reed's views, see Johnsen, *op. cit.* 69. For the views of Homer S. Cummings, Harold L. Ickes, William Draper Lewis, Henry A. Wallace, Thomas Reed Powell, Clarence Hathaway, Robert M. LaFollette, Harry L. Hopkins, James M. Landis, Ferdinand Pecora, Thurman W. Arnold, Harold J. Laski, Leon Green, William Green, Justin Miller, Charles Grove Haines, Edward S. Corwin, all in favor of the proposal, see Johnsen, *op. cit.* and *Hearings*. For views of Burton K. Wheeler, Raymond Moley, Erwin N. Griswold, Edwin Borchard, Dorothy Thompson, Walter F. Dodd, Frederic R. Coudert and others, all opposing the proposal, see *Hearings*; on the subject generally, see Dean Alfange, *The Supreme Court and the National Will* (1937); Morris L. Ernst, *The Ultimate Power* (1937); Alsop and Catledge, *The 168 Days* (1938); for Frankfurter's views, see *id.* 75 and *Hearings* 487.

19. Theodore Roosevelt, quoted in Ransom, *op. cit.* page 14, *supra* n. 15; *Hearings* 42, 168, 231, 346; Jackson, *op. cit.* page 180, *supra* n. 18.

20. See for example Herman Finer's attack on Friedrich A. Hayek and his *Road to Serfdom* (1944) in Finer's *Road to Reaction* (1946). For example, Finer says (page 60): "In a democracy right is what the majority makes it to be". Of Lenin he says (page 104): "He fought for the conviction that the dictatorship of the proletariat (which being a majority would be no dictatorship). . . ." At page 105, Finer speaks of the failure of Hayek, Chamberlin, Eastman and Eugene Lyons "to distinguish between the antipopular nature of the Fascists and the Nazis, and propopular impulse of the Soviet system". Finer is referred to here only because he is typical of those who call any who may oppose further governmental control of economic life in any respect "enemies of democracy".

21. For example, Aristotle, *Poetics*, c. iv. (London edition, 1912) 116; Aquinas, *De Regimine Principum*, 1, c. 5; Madison, in 5 *Elliott's Debates* (1845) 162; John Adams in letter to Jefferson, Nov. 13, 1815, 10 *Works* (1851) 174; 6 *id.* 8, 48, 110; also quoted in C. E. Merriam, *History of American Political Theories* (1920) 126-127; Walsh, *The Political Science of John Adams* (1915) 39; 1 Hamilton *Works* (Federal ed., 1904) 389, 401; 2 *id.* 42; 9 Jefferson, Works (Ford ed., 1907) 29; 15 Webster, Works 513-522 (National ed., 1903) 515; Miller, J., in *Loan Association v. Topeka*, 20 Wall. 655 (U. S., 1875).

International Courts of Appeal:

A Judicial Approach to World Order

by **Robert B. Ely III** • of the Pennsylvania Bar (Philadelphia)

■ In this article, Mr. Ely discusses the need for an international judiciary which in his opinion is the only means for ensuring world peace. He catalogues the weaknesses of the present system of private international law, and outlines the form which international courts of last resort might take.

■ One of the most important problems today facing the world in general, and lawyers in particular, is that of substituting world order under law for the periodic and ever-increasing horrors which were last suspended on V-J Day. This problem will never be solved by any form of inter-governmental arrangement until the peoples supporting those governments have formed the firm habit of settling all disputes by legal means, rather than by war.

History shows how this habit of law-abidance has grown: from the family into the tribe, city and state. It must now be spread throughout the world. As before, its growth must be from the private and domestic into the public and foreign. The roots are in the individual, the branches in institutions. Without these roots, the branches will never come to flower. Above all, the seeds must not be sown on barren ground.

What, then, are the circumstances under which the habit of law-abidance can be formed?

A necessary condition to orderly life in any community is an adequate body of legal rules that are clearly defined, widely known and universally respected. The sufficiency of this condition has been repeatedly demonstrated throughout the world at the municipal, state and national levels. Its necessity becomes apparent when one considers the comparative chaos which accompanies its absence from the international field. Two world wars in a single lifetime have been the effects, and Judge Manley O. Hudson (as quoted in 30 A.B.A.J. 560; October, 1944) has well stated the cause:

> To many laymen [international law] seems to present itself as a ghost which stalks only in distant parts of the earth, without any relation to the work-a-day world in which we live and toil. Even to some lawyers it looms as an esoteric if not an evanescent mystery to be invoked only when it serves to bolster a prior political opinion. . . .

William E. Jackson, personal assistant to the American Chief of Counsel at the German war crimes trials, writing in the July, 1947, issue of *Foreign Affairs*, put the matter more succinctly when he said, "For a long time prior to Nuremberg international law was scoffed at as pious but impotent".

The reason for these attitudes of bewilderment, cynicism and scoffing is not hard to understand. To the average layman and to nearly all lawyers, a respectable body of law is one which consists, in addition to legislative enactments and executive rulings, of systematically published and collated decisions of permanent courts with jurisdiction to declare the law and to enforce it on individuals. International law lacks all these essentials to knowledge and respect, which alone can make it effective.

An International Judiciary Is the Only Solution

There are no regularly constituted international legislative assemblies or executive departments. Apart from the International Court of Justice, whose jurisdiction is limited to proceedings in which states are parties and is only contingently compulsory, international law has no permanent tribunals of its own. It is obliged to rely on isolated and temporary *ad hoc* courts and commissions or on the good graces of national judiciaries. The awards and decisions which compose the precedents of international law are not collected into a single "International Law Reporter" of the form familiar to lawyers in other fields, but have to be sought under such misleading headings as "War", "Aliens" or "States" in national digests or in textbooks whose only authority lies in the reputation of their authors. Finally, none of these awards or decisions has ever been enforced against individuals by

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other than national law enforcement officers.

In short, international law is now in the easily imaginable state in which the federal law of the United States would be had the Constitution made no provision for a President; had the Congress been merely a national open forum; had the jurisdiction of the Supreme Court been made subject to consent of the parties and limited to suits between states; had there never been any federal circuit courts of appeal and district courts; had the declaration of federal law been left to state courts and its enforcement to state sheriffs; and had there been no interpretations of federal law other than such writings as the *Federalist*, the decisions of state courts and interstate compacts. Under such circumstances the words of Judge Hudson and Mr. Jackson, quoted above, would but mildly describe the attitude of the average layman or lawyer toward American federal law.

The foregoing catalogue of the weaknesses of international law suggests the general form of necessary remedy. To achieve complete world order under law will require the development of an international judiciary to declare and enforce international law in particular cases, an international legislature to enact laws in keeping with changing world conditions and an international executive to perform traditional administrative functions. For the purposes of present discussion we put aside the legislative and executive problems with only reference to the comments of the winner of the American Bar Association's 1947 contest for essays on the improvement of international legislation. He says in effect that attempts to constitute an international legislature or executive with authority to make international law what it *should be* would be both futile and dangerous until there has been built up a world-wide consensus as to what international law *is*.

Minimum Requirements for International Judiciary

Turning to the question of an international judiciary, our discussion so far indicates that it must meet the following minimum specifications:

(1) The courts composing it must derive their authority from an international, rather than a national or multinational source;

(2) Its rulings must be superior to those of national courts;

(3) Its decisions must be binding upon the individuals concerned, and must have all the future force accorded under the doctrine of *stare decisis*.

In seeking to establish such tribunals by other than forceful means, it would seem that the greatest chance of success would be insured by close adherence to the following principles of action:

(1) No step should be taken without the unanimous consent of all countries concerned in that step;

(2) In order to make such consent likely, surrenders of national sovereignty should be kept at an absolute minimum, while no greater than necessary departure should be made from existing procedures.

Proceeding along these lines, we find that the only possible international creator of international courts is the United Nations. That organization already has an International Court of Justice as its "principal judicial organ". Could this tribunal be remodeled to meet the foregoing requirement? In theory, yes, but in practice, no. Any revision in this Court's set-up would be subject to the veto which the Russian bloc would certainly use. On the other hand, the General Assembly is given by Article 22 of the Charter the authority to establish "such subsidiary organs as it deems necessary for the performance of its functions", including (Article 13) "encouraging the progressive development of international law"; and here no more than a two-thirds majority vote is required.

Why, therefore, should not a group of nations operating under substantially similar legal systems (as for example the United States and one or more members of the British Commonwealth of Nations, or the countries of Central and South America plus Spain and Portugal) execute a protocol for a statute of the General Assembly providing, subject only to the Assembly's approval, for the establishment of an International Court of Civil Appeals with organization, competence and procedure substantially as next indicated?

Its full bench would consist of a President Judge, designated to the task by the International Court of Justice, and of additional judges appointed in equal numbers by each nation of the circuit in the same manner as judges of the national court of last resort, subject to confirmation and commissioning by the General Assembly. Particular sessions would be composed as the adhering nations might agree.

Whenever there came before the court of last resort of any adhering nation a proceeding in which it appeared or was claimed that there was involved a question of international law (in the sense that disposition of the case required interpretation or application of any international convention or any generally accepted international custom or legal principle) the proceedings would be certified by the national court of last resort to the International Court of Civil Appeals for final determina-

tion. The certification would be accompanied by an opinion (to be binding on the I.C.C.A.) by the certifying court on all questions of national law. The final decision by the I.C.C.A. would be remitted and enforced in the same manner as a judgment of the court of last resort of the country in which the proceedings arose, and would thereafter be accorded in each of the adhering countries the same force as a judgment of the court of last resort in that country.

If no more than one such court were established, its day-to-day functioning in actual litigation involving individuals would go far toward publicizing and more firmly establishing those principles upon whose recognition and respect rests the whole future of international law, namely:

(1) That international law already exists, independent of and superior to national law;

(2) That it is binding directly on individuals;

(3) That it is possible to establish international agencies for its interpretation and enforcement.

If more than one such court were established, and if conflicts were to arise among the decisions upon particular points, the various countries concerned might then avail themselves of the International Court of Justice's power to render advisory opinions as to which of such decisions was correct. In this fashion the codification of private international law would progress in an orderly and efficient manner.

Full discussion of the arguments in favor of the foregoing proposal would unduly extend this discussion. However, in support of the principles it seeks to embody, we quote brief portions of a recent address by Justice Robert H. Jackson, of the Supreme Court of the United States (22 *Temple Law Quarterly* 153):

> It is indispensable to development of an effective modern law of nations that it lay obligations upon living individuals as well as upon that abstraction known as the state. . . . We should take advantage of every opportunity to deal with international controversies by adjudicative or arbitral techniques. In this way we will enlarge and expand the world's experience in using these orderly and reasonable processes, fashion an increasing body of decisional and customary international law, and encourage the law-abiding habit among nations.

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It is ethical for a United States Attorney or an Assistant United States Attorney to practice on the civil side of the federal courts unless there be other reasons than his official position for disqualification.

Canons 6, 29
Judicial Canon 31
Opinions 135, 262

▪ The opinion of the Committee was stated by Mr. JACKSON, Messrs. Brand, Drinker, Jones, Miller, White and Wuerthner concurring.

▪ The Chairman of the Committee on Ethics of a county bar association asks whether or not it is ethical for a United States Attorney or an Assistant United States Attorney to practice on the civil side of the federal court. He states that the question arises out of the belief of certain members of the county Bar that a United States Attorney or an Assistant United States Attorney has a decided advantage over any other attorney in practicing on the civil side of the federal court because of his constant dealing with the federal judiciary, his thorough knowledge of the federal process, and most particularly his closeness to the federal jurors.

Presumably private practice by these officials on the civil side of the district courts is permitted because the official salary is low and a competent attorney would not accept appointment unless allowed thus to increase his earnings.

In determining the propriety of similar practices previous opinions of the Committee (reviewed in *Opinion 262*) have applied these tests: Would the practice

(1) Lessen the confidence of the public in the integrity and impartiality of the administration of justice?

(2) Would it be a reflection on members of the legal profession?

(3) Would it interfere with cooperation between state and federal prosecuting attorneys?

None of the objections made by the county Bar runs counter to the tests which the Committee has heretofore applied unless the Committee is prepared to hold that the federal judges of the district are lacking in impartiality, that a thorough knowledge of federal law and procedure disqualifies an attorney from accepting a retainer in a federal civil suit, and that the prescribed method of selecting a federal jury does not result in obtaining a disinterested panel.

No canon specifically makes it unethical for a United States attorney to appear in an ordinary civil suit between private litigants and we accordingly hold that it is not unethical for a United States attorney because he holds that office to practice on the civil side of the United States District Court. This does not mean that a United States attorney may accept all types of cases on the civil side. He certainly should not, for obvious reasons, accept any case in which the United States is a party, or one which would interfere with cooperation between state and federal prosecuting attorneys. There are doubtless other cases which good taste and good name of his profession would require him to refuse.

As this Committee said in *Opinion 135:*

> By analogy, the *thirty-first Canon of Judicial Ethics* applies to the situation here presented. Referring to part time judges who practice law, it is there said: "In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success." This statement is equally applicable to prosecutors.

7

Lawyers in the Senate:

They Predominate in 81st Congress

by **Albert P. Blaustein** • of the New York Bar (New York City)

■ Of the ninety-six members of the Senate of the United States in the 81st Congress, one third are lawyers. A lawyer-predominated Senate is not rare in our history, but it is interesting to follow Mr. Blaustein's breakdown of the background and experience of the lawyer-senators in the new Congress.

■ Another lawyer-predominated Senate marched up Capitol Hill early last month as Washington greeted the fifty-four Democrats and forty-two Republicans who comprise the upper chamber of the nation's 81st Congress. For once again the American electorate has shown its confidence in its legal representatives, and the path to the Senate is still marked by the milestones of law school, legal practice and governmental service as public attorney or judge.

No less than two-thirds of the new Senators are members of the Bars of their respective states, and three additional Senators have had extensive legal training. Also numbered among the country's ninety-six top law-makers (including Vice President Alben W. Barkley, the Senate's presiding officer, whose own senatorial post has not as yet been filled) are fifteen ex-judges, thirty-one former federal, state, county and city attorneys, and five law professors.

Twenty-one of the states have elected two attorneys to serve in the Senate; twenty-two states will be represented by one attorney and one layman; and only five states (Delaware, Minnesota, New Hampshire, South Dakota and Vermont) will be without a lawyer delegate.

The percentage of lawyers among the Democratic representatives far exceeds that in the Republican bloc. Forty-two of the fifty-four Democrats in the Senate are members of the Bar, while only twenty-two of the forty-two GOP Senators have been practicing attorneys.

But neither sectional characteristics nor the type of commercial activity within the various states has had any effect upon this election of Democratic lawyers to the Senate. Such essentially agricultural states as Iowa and Kansas have selected two attorney representatives, and such heavily industrialized urban states as Connecticut and New Jersey have followed suit. On the other hand the farming state of South Dakota and the "corporation-lawyer" state of Delaware find themselves without attorney representatives in the 81st Senate. Making the national picture all the more confused, South Dakota and Arkansas have two Democrats each in the Senate; New Jersey has two Republican Senators; and Iowa, Connecticut and Delaware are each represented by one Democrat and one Republican.

Despite the fact that eighteen new members will have seats in the Senate (fourteen Democrats and four Republicans), the number of lawyers (sixty-four) is the same as in the 80th Congress. The percentage of former judges and governmental attorneys, however, has increased.

The sixty-seven members of the Senate who have had legal training attended a total of forty law schools. Six Senators are alumni of Harvard; five are graduates of Columbia; four were students at the University of Michigan; three each received their legal education at Georgetown University, Yale and the University of Alabama; and two each attended West Virginia University, Temple University, the University of Virginia and the University of Maryland. With the exception of those who studied at Harvard, Columbia and Georgetown, practically all of the Senators obtained their legal training in their home states.

Harvard is unique in having three members of one law school class in the Senate at the same time. Senators Owen Brewster (Republican, Maine), James P. Kem (Republican Missouri) and Robert A. Taft (Republican, Ohio) all received their LL.B's at Cambridge in 1913. And during the school year 1912-13, they were

Albert P. Blaustein is already known to JOURNAL readers as the author of two articles published last year (34 A.B.A.J. 473, 885; June, October, 1948). This time he turns from Sherlock Holmes and stamp collecting to the United States Senate for his material. Graduated from Columbia Law School just one year ago this month, Mr. Blaustein is now practicing law in New York City.

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joined by J. Melville Broughton, the newly elected Democratic Senator from North Carolina.

The three members of the Senate who have had legal training but who have not become practicing attorneys are newspaperman Arthur Vandenberg (Republican, Michigan), agriculturist Zales N. Ecton (Republican, Montana) and school teacher Lyndon B. Johnson (Democrat, Texas).

Heading the list of Senator-Judges are Patrick A. McCarran (Democrat, Nevada), former Chief Justice of the Supreme Court of Nevada; Robert S. Kerr (Democrat, Oklahoma), a special justice of the Oklahoma Supreme Court in 1931; Robert F. Wagner (Democrat, New York), who served on both the Supreme Court and the Appellate Division in New York; and Walter F. George (Democrat, Georgia), sometime member of both the Superior Court and the Court of Appeals in Georgia.

Others include former Circuit Judges John C. Stennis (Democrat, Mississippi), Joseph R. McCarthy (Republican, Wisconsin) and Homer Ferguson (Republican, Michigan); District Judge Arthur V. Watkins (Republican, Utah); Superior Court Judge Ernest W. MacFarland (Democrat, Arizona); County Judges Alben W. Barkley (Democrat, Kentucky) and Spessard L. Holland (Democrat, Florida); and Criminal Court Judge Harley M. Kilgore (Democrat, West Virginia). Bert H. Miller (Democrat, Idaho) was judge of a local Idaho court. Both of Connecticut's Senators presided over municipal courts: Brien McMahon (Democrat) is a former justice of the Norwalk City Court and Raymond E. Baldwin (Republican) was on the bench of the Town Court of Stratford.

Outstanding among the governmental attorneys are J. Howard McGrath (Democrat, Rhode Island), former Solicitor General of the United States; and former state attorneys general, Bert H. Miller (Democrat, Idaho), William Langer (Republican, North Dakota), John W. Bricker (Republican, Ohio) and Herbert R. O'Conor (Democrat, Maryland). Francis J. Meyers (Democrat) was Deputy Attorney General of Pennsylvania; Ernest W. McFarland (Democrat) was Assistant Attorney General of Arizona; Brien McMahon (Democrat, Connecticut) was Assistant Attorney General in charge of the Criminal Division of the Department of Justice; and J. William Fulbright (Democrat, Arkansas) was in the Anti-Trust Division of the Department of Justice. The remainder of the thirty-one ex-government lawyers held the posts of city, county or district attorneys.

Wayne L. Morse, (Republican, Oregon) is one of the few Senators who was "elected from the classroom."Prior to his election to the Senate he was dean of the law school of the University of Oregon. Claude Pepper (Democrat, Florida) and J. William Fulbright (Democrat, Arkansas) both taught law at the University of Arkansas, and Senator Fulbright went on to teach law at George Washington University. Senator Homer Ferguson (Republican, Michigan) has taught classes at the Detroit College of Law, and Senator Theodore F. Green (Democrat, Rhode Island) once taught Roman law at Brown.

With this extensive legal background, the 81st Senate is more than well equipped to handle the intricate technical problems involved in the nation's law-making. And it is again apparent that it is the lawyer who is the first to dedicate himself to public service. It is the lawyer who has received the mandate of leadership from the American electorate.

8

The Right To Work:

It Must Be Supreme over Union Security

by **George Rose** • of the Indiana Bar (Indianapolis)

■ The law balances conflicting "rights" in many fields, but nowhere is there more controversy over the balancing than in the field of labor law where the right to work is now being challenged by the assertion of the unions' right to security. With commendable dispassion in an area where the lack of objectivity is often remarkable, Mr. Rose poses the problem and gives his answer.

■ In all cases of conflicting rights we must determine by a delicate balancing which right must prevail. At one time it may be the right of the individual that will be paramount, while at another, it is the right of the group or the community. It must be this way, lest the individual become submerged in the mass, or we lose the group in an anarchy of individual claims. Neither extreme represents the democracy which we have known.

Before us we have a very vital question: the controversy relative to the individual's right to work, regardless of membership in the majority union, and the right of the union to force the employee to join the union, if he wishes to work. It is especially timely to consider this, in view of the cases decided January 3 by the United States Supreme Court, arising under state laws banning union security.[1] Which right is more important in this extremely elemental situation, and which is entitled to precedence?

Let us look at it from different angles. Is the individual merely being stubborn and anti-group-minded in not joining the union, and in failing to unite with his fellows for the betterment of all, if there is no principle at stake? Or is he actuated by principle? Is the group seeking a justifiable control over all the employees, in order to secure better performance of their agreements, or is it striving for a domination over all the employees, which is unnecessary for the protection of the rights of the group, and is an unwarranted interference in the rights of the individual?

When the community considers it essential to have all persons attending school vaccinated, the opinions of a contrary minority must yield to the considerated determination of the majority that vaccination is necessary to the protection of the health of the whole community. The Supreme Court pointed out that "real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own,—regardless of the injury which may be done to others".[2]

Under this principle the union claims that the individual must not use his right to the detriment of what it calls the economic health and solidarity of all the employees. However, we must examine what the union is trying to do. It would deprive a man of his essential right to work, without establishing that this solidarity and discipline are a *sine qua non* of union existence, for the protection of joint rights and the requirements of economic health.

Right to Collective Bargaining Protected by Law

Congress passed the National Labor Relations Act, recognizing and enforcing the right of self-determination, which, under this Act, is the right of individuals to form labor organizations for the purpose of collective bargaining because of the individual's inability to bargain with a corporate employer with any degree of equality.[3] The right of self-determination would therefore seem to be, not a mere supplanting of the individual right to bargain, but a requirement that individuals unite to bargain, if a majority desire it. In other words, it is a reinforcing by merger of the individual rights of the members of the group, because of their separate ineffectiveness, and giving this group action paramountcy.

The union contends that without union security self-organization is

1. *AFL v. American Sash & Door Co.*, 69 S. Ct. 258 (1949).
2. *Jacobson v. Massachusetts*, 197 U. S. 11.
3. 49 Stat. 449, 29 USCA, Sections 141 *et seq.*, 1947 supplement.

Foster Photos

George Rose, after being graduated from the University of Pennsylvania Law School, practiced in the District of Columbia, served as a regional attorney and trial attorney for the NLRB, and since 1939 has been in private practice in Indianapolis, specializing in labor law. He has been a member of our Association since 1945.

similarly ineffective. This argument appears erroneous from the experience of unions. Without union security, the union is denied great power, which has at times meant arbitrary power, but it is neither requisite to the purpose of the union and its agency, nor is it a privilege to which the union is entitled on its merits.

The right to self-organization is founded upon the right of a man to work and pursue a calling, for it is the uniting of fellow workers for their economic betterment. In upholding the constitutionality of the Act, the Supreme Court described it as a "fundamental right", giving "employees . . . as clear a right to organize and select their representatives for lawful purposes as"[4] a corporation has. In providing for collective bargaining the Act assumes the existence of the right to work, since the representatives are to bargain as to "rates of pay, wages, hours of employment or other conditions of employment".[5] To reason otherwise would be to argue that the right to work arises from the right of self-organization, which is contrary to fact, as the right to work exists regardless of self-organization.

The Supreme Court links this right of self-organization with the right of people peaceably to assemble and petition the government for the redress of grievances. In a democracy all persons must be permitted peaceably to assemble for a lawful purpose either in the advancement of their private interest or of the general interest.[6] The union would identify this right of assembly with the right to union security, as being inseparable, yet unions have notoriously denied their own members the right of assembly with regard to their own union governance, calling it "dual unionism". Union security therefore appears suppressive of the right peaceably to assemble, upon which the right of self-organization is based, and consequently it interferes with the right of self-organization, as a continuing right.

While the union emphasizes the right of self-organization, with all its pendant privileges and claims accruing to the union, including union security, it rejects the individual's right to work, which is even more basic, proceeding from the United States Constitution itself. This is a primary right, more essential than any other except the right to life, which are both part and parcel with the right to liberty.[7] If a man cannot choose his calling, business or trade, "as may be best adapted to his faculties", he is being deprived of his liberty. A man must work if he is to live and reap the full advantages of democracy. To be denied the right to work, must condemn him to being a state dependent.[8]

The right to self-organization, as we have pointed out, is a merger of individual rights to bargain, and is correlative with the right to form, join or assist labor organizations, serving the advantage of the group. If this right of self-organization interferes with or deprives others of the right to work, as the union would have it, then it must yield, because the right to work is primary, while self-organization is secondary.

A superficial consideration of this matter might lead one to conclude that under the National Labor Relations Act, the domain of self-organization includes the right to work, which is the right to be employed. This is rebutted by the Supreme Court which, in discussing the effect of the collective agreement with regard to individual contracts, said: "There is little left to individual agreement except the act of hiring .... In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure."[9] Therefore the right to work, to obtain employment, has not under the Act been amalgamated with the collective agreement, although its terms may regulate employment. Consequently, a group of employees, even though they are a majority of the employees of an employer and desire to make membership in the union an essential requirement of the right to work for that employer, do not have the right and should not have the right to deprive an employee of the primary right to work. This would be repugnant to our ideas of democracy, for as the Supreme Court has said, "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself".[10]

An attempt is made by the union, in its attack upon this right to work, which it describes as an "alleged right to work", to draw an entirely unjustified analogy between the union and the state to support the right of union security. Our national state was established by the people to provide a government of democratic principles, and to give protection to

4. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1. (1937).
5. *NLRA, supra*, note 3.
6. *Thomas v. Collins*, 323 U. S. 56 (1945).
7. *Powell v. Pennsylvania*, 127 U. S. 684 (1894).
8. *Butchers Union Co. v. Crescent City Co.*, 111 U. S. 746 (1880).
9. *J. I. Case v. NLRB*, 321 U. S. 332 (1944).
10. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

the basic and fundamental rights of persons. The union was not formed to give economic government to its members, but to enable them to bargain more effectively with the employer as to certain economic matters. The idea of economic government came later, when union leaders saw in union security the means of more aggressive control over the members, and better discipline, more comparable to an army than to a government.

The union is the representative and agent of its members, and under the National Labor Relations Act, of all the employees of the employer in the appropriate unit, but it has no right to assume or claim a political authority under the guise of economic rights, which would have the result of barring primary rights to other persons. Such authority would be unconstitutional and presumptuous. To have any validity at all, it must come from the body politic, and not from a small segment, which desires to increase its own power.

Unions Should Not Have "Extra-Constitutional" Status

It is one thing for the union to represent the employees in a plant and bargain with the employer for the purposes of concluding the conditions of employment; such proper agency cannot be said to exist where the union is no longer acting in such capacity, but seeks to establish an extra-constitutional, a pseudo-political status. In any case, the union is not entitled to oust all employees who will not join the union, and keep them from working for that employer or at a trade. But over and beyond this, the employees themselves, whatever form or capacity they assume, do not have the right to do this, as it deprives others of more basic rights, than the secondary right of self-organization, which they allegedly strive to realize. This is not the case where one individal is trying to use his own liberty regardless of the injury or consequences to others, referred to above, but on the contrary, it is an effort by the group to prevent a person from exercising a superior right, the right to gain employment, regardless of union membership.

The claim that this right or "liberty", as they would call it, has become an institution, seeks to give it an authenticity and authority which is lacking. The fact that the union security forms have been acquiesced in cannot give them any legal sanction, for no statute of limitations could run against such basic rights of the people. The claim that this right is necessary to give strength and stability to the union is merely to plead expediency and to confess the failure of the union to win democratic support.

Democracy Demands Supremacy of the Right to Work

Its true analogy is to the totalitarian state. The unions quite naturally have recognized the advantage of universal membership, and have resented the rivalry of other organizations, even that of sister unions. However, if such supremacy cannot be attained by democratic methods, with the maintaining of democratic standards, it cannot be recognized. Under the "yellow dog" contract, the employer has sought by force of the employee's economic necessity to obtain his agreement not to join a union. Likewise through the union or closed shop contract, the union has sought by the same undemocratic methods to compel him to join the union. Both the employer and the union are to be condemned for resorting to such undemocratic practices.

The limitation upon the individual's right to work where he can find a job must lead to the undermining of our democracy. This is only the first step, but the second step which follows close behind, is the right of the government to determine where the individual should work, and to shift the employee from job to job. We cannot welcome this possibility, because such regimentation, domination and interference with the individual's activities, must shatter and destroy our highly prized freedom. Consequently, the right to work, and to do such acts as the individual may judge best for his interest, consistent with the equal rights of others, must be upheld as being an essential element of that liberty that we claim as our birthright.[11]

11. *Butchers Union Co. v. Crescent City Co., supra, note 8.*

Jury Verdicts:

A Study of Their Characteristics and Trends

by **Richard Hartshorne** • Judge of the Court of Common Pleas, Newark, New Jersey

■ For twelve years in his court Judge Hartshorne studied jury verdicts: their correlation in civil cases with the verdict the judge would have rendered had he tried the case without a jury, the relation of the amount of damages awarded to existing and fluctuating economic conditions, and the correlation in criminal cases between the number of convictions in jury trials with the number in bench trials. From his multitude of engrossing figures, Judge Hartshorne concludes that the jury, in most cases, renders "realistic justice".

■ Jury trials and verdicts are the subjects of perennial discussion both by the legal profession and the public. Many of the writings in this field constitute studious and helpful attempts to better admitted defects. Most of the informal discussions of verdicts, however, and especially those that deal with their correctness, are likely to be at the instance of a disappointed suitor or his counsel, and not to afford a reliable basis for a fair evaluation of the jury system. Such criticism is generally based either upon a single trial, or a relatively few.

The most accurate way of testing the correctness of a jury verdict would be to try the case twice, first before a jury, and thereafter before a judge sitting without a jury, and to do this, not with one case but with hundreds. Since this is obviously impossible, the more practicable method of testing the question is to compare, in a large number of cases, the verdict upon the merits which the jury did give, with the judgment on the same merits which the judge presiding at these trials would have given had he been asked so to do. Indeed, such would be a somewhat venturesome undertaking on the part of the presiding judge—to set up his private and unofficial opinion in comparison with the official verdict of the jury, which presumably applied the law to the facts under his instructions. But in the pursuit of knowledge, whether scientific, sociologic or legal, the explorer must run some risks.

Hence, a number of years ago, in the effort to direct some light on this much-debated issue, I began to keep definite, private records as to how my viewpoint accorded with the verdicts of juries which sat before me. I have sat for more than fifteen years in a court having unlimited civil and criminal common law jurisdiction; the court being located in the metropolitan northern section of New Jersey, near New York City, in an area which has a population of nearly 1,000,000.

This record covers the last twelve years, with a hiatus of some eleven months caused indirectly by the war. During this period, I received verdicts from juries in 523 cases—253 on the civil side, 270 on the criminal. These by no means included all the causes tried to a jury. Eliminated for obvious reasons are cases where verdicts were directed, where the jury disagreed, friendly settlements and causes, both civil and criminal, tried to the court alone, without a jury. These latter approximated, on the criminal side, the cases tried with a jury. On the civil side, however, the great bulk of the cases tried are included because (1) almost all civil actions at law in the upper courts are tried to a jury, and (2) a heavy proportion of such cases are automobile accident cases, to which the present statistics are confined.

Of this total of 523 cases in which verdicts were received from juries I considered the verdict correct in 437 cases and questionable in 68 cases. In eighteen of these more than 500 cases, the decision was so close that, though doubt existed, the presiding judge did not feel it fair to find the jury's verdict to have been wrong. More specifically, of the 270 criminal jury verdicts, but thirty appear to be wrong: eight where the verdict of guilty should probably have been not guilty, and twenty-two where the verdict of not guilty should have been guilty.

On the civil side, out of the 253 verdicts received, the court had serious question with but thirty-eight, in seventeen of which it was felt that the verdict for the defendant should probably have been for the plaintiff,

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whereas in twenty-one others the verdict for plaintiff should probably have been otherwise. It should be noted that in certain of these questionable verdicts for plaintiff some were considered erroneous because the amount of damages was substantially out of line, while in others it was obvious that the verdict had been the result of a compromise. It should be further noted that my private viewpoint as to the correctness of the jury's verdict in the civil cases was not based upon the comparatively narrow criterion applicable to the granting of a new trial, i.e., that the verdict must appear to be so unreasonable as to indicate that it is the result of passion, prejudice, partiality or mistake. On the contrary, in passing private judgment upon these civil verdicts, I was even stricter than the jury. For, while I did not note my disagreement with the verdict if there was a comparatively few dollars difference in the amount I would have awarded from that awarded by the jury, nevertheless, if the variance was substantial, I noted the verdict as incorrect, even though this difference was not sufficiently substantial to be the basis for a new trial under the above rule.

Mathematically speaking, then, I felt the jury's verdict to be unquestionably right on the criminal side in 89 per cent of the cases, and on the civil side in 85 per cent. This slight difference was due, doubtless, to the fact that there was room for a difference of opinion on the criminal side only on the one point of guilt or innocence; whereas on the civil side that difference of opinion might be both as to whether the verdict might be for plaintiff or defendant and also as to the amount of damages, if rendered for plaintiff. In short, according to the privately recorded viewpoint of this single presiding judge, sitting in more than 500 cases both civil and criminal over a period of some twelve years, the jury's verdict would appear to have been unquestionably right more than 85 per cent of the time.

While this "batting average" will doubtless surprise many of the most outspoken critics of the jury system, at the same time it must be frankly admitted that these somewhat novel statistics, gathered over a considerable period of time, cannot furnish an entirely satisfactory criterion for evaluating the correctness of jury verdicts as a whole. For the comparison is being made with the judgment of but a single individual, and in determining close questions of fact, any possible personal idiosyncrasy of this single judge may perhaps find a reflection. In fact, the elimination of any such individual peculiarity by obtaining the combined judgment of the "twelve good men and true" is one of the prime advantages of the jury system.

In the present study we have at least a tentative check on this standard of comparison, in that the variations from this standard on the part of the verdicts are found to exist not all one way, or as to one party but in all ways, in both criminal and civil cases and as to all parties. Moreover, as noted, this variation on the criminal side definitely accords with the commonly accepted adage that a defendant with a weak case should always try it to a jury, while the variations on the civil side are equal as to both plaintiff and defendant. Further it should be borne in mind that this entire comparison has been made in cases which are of the simplest character. Obviously, in cases of a more complicated nature, whether of fact or of law, the "batting average" of the juries here studied might well suffer somewhat. On the whole, however, it is felt that the data here presented, although inconclusive, may throw some light on this much-discussed question of the correctness of the average jury verdict, since they do deal with literally hundreds of cases, the merits of each one of which have been separately considered, as a basis for comparison. The net result, showing that the verdicts of the juries rendered in these many hundreds of cases over a period of more than ten years were in full accord with the viewpoint of the presiding judge well over 85 per cent of the time, should go far to destroy the rather popular misconception as to the unreliability of this "palladium of our liberties".

Various Interesting Aspects of Jury Verdicts

Let us turn then to certain further aspects of jury verdicts which may be of interest.

A. On the civil side

1. How do juries deal with plaintiffs as compared with defendants?

2. Do verdicts fluctuate from year to year as between plaintiffs and defendants?

3. Do verdicts fluctuate from year to year in the average damages awarded to plaintiffs?

B. On the criminal side

1. How do juries deal with the state as compared with the defendant?

2. How do the verdicts of juries for the state and for the defendant compare with judgments for the state and the defendant in similar cases when rendered by the judge sitting without a jury?

3. How many defendants are found guilty by trial as compared with those who plead guilty?

In the attempt to throw some light on these further questions on the civil side, I had a study made with the helpful and interested aid of the Essex County Clerk's Office (New Jersey) of the civil causes tried by the judges sitting in the common law courts of unlimited civil jurisdiction in that county during the last twenty years. This study was confined entirely to motor vehicle negligence cases and excluded all cases on contract and negligence causes of other characters, in order to eliminate the effect of as many casual factors as possible. While these eliminated categories of causes removed several hundreds of cases from this statistical analysis, nevertheless, since the bulk of the causes tried in the Essex County Circuit and Common Pleas Courts by from four to eight judges sitting constantly were motor vehicle negligence cases, the number of jury verdicts included in this study was a substantial one, running into not the hundreds, but the thousands.

Results of Study in 3330 Vehicle Negligence Cases

We turn to the results of the 3330 jury verdicts analyzed. We find that 2386 were rendered for plaintiff and 944 for defendant. On the average then, our "twelve good men and true" favored the moving party 72 per cent of the time, the defending party 28 per cent. And even in this variation from equalization in dealing with the litigants appearing before them, a definite fluctuation appeared. This fluctuation ranged from 92 per cent for plaintiffs and 8 per cent for defendants in 1936, to 51 per cent for plaintiffs and 49 per cent for defendants in 1940. Most of the time, however, the verdicts substantially preponderated in favor of the plaintiff.

However, this disproportion cannot be set down, out of hand, as indicating injustice. For, before the average suit is instituted by the average attorney, he must be convinced that it is likely to result in a verdict for plaintiff. Otherwise he will not put up either his or his client's funds for court and other trial expenses. Of course there are many strike suits begun, though a lesser number brought to trial. While some attorneys will initiate or perchance even start the trial of suits on a contingency (which they do not really expect to win) simply to collect their nuisance value in settlement, this is not so on the average and in the long run. Hence this general trend of verdicts in favor of plaintiff somewhat conforms to the probabilities of the cases themselves, as they appear to the attorney, when he weighs them as impartially as possible before expending his own or his client's money in starting litigation. On the other hand, we must remember that in the bulk of these motor vehicle cases, the defense is being conducted by an insurance company. Since these companies have considerable trial experience, they are likely to offer settlements in most good-plaintiff cases. This would tend to counteract the factor to which I have alluded.

But, in any event, it is interesting to learn that over a course of twenty years covering thousands of motor vehicle negligence cases, verdicts for plaintiff result almost thrice as often as verdicts for defendant, though during recent years this proportion has been much reduced. The question remains whether there is an economic cause for this variation, because of a similar variation in the cost of living, the price index, or the converse, the purchasing power of the dollar. There was a gradual decrease in the proportion of plaintiff verdicts to those for defendant from 1927 through 1935. In 1936, there was a sudden rise in this same proportion, and thereafter a further decline, practically to date. In the cost of living there was a similar decline from 1927 through 1933, thereafter there was a gradual rise for four years through 1937, and a more or less static period therefrom to 1940, with a rise thereafter to date. The above statistical analysis has, however, demonstrated another very interesting trend. In addition to the fluctuation of these verdicts, as between the two parties, a fluctuation exists in the size of the verdicts rendered solely for the plaintiff. As noted, over this period of twenty years and out of this total number of 3330 verdicts, there was a total of 2386 verdicts for the plaintiff.

Plaintiff Verdicts Soar with Inflation

The sharpest change in the average of plaintiff verdicts is noted during 1946-47, when in normally belated response to the recent rise in the cost of living and decrease in the value of the dollar, the average of verdicts for plaintiff soared to unprecedented heights. Barring this development, these verdicts ranged from an average of $3248 in 1934 to an average of less than half that amount—$1562—in 1938. Why? In addition, these verdicts individually fluctuate greatly, ranging from $93,400 in some cases to the nominal verdict of six cents in others, the average verdict for the plaintiff for these years being approximately $2200. But the interesting point is the wide fluctuation in the yearly average of the amount of the verdicts over a period of twenty years. Can this fluctuation be merely casual? Is it due to some general economic cause affecting the public as a whole? Or is there an additional reason, psychologic or otherwise?

The variation in certain instances is more apparent than real. In 1937 and 1939 the relatively sudden upcurves in the generally downward trend are due to certain unusually large verdicts, which, because of the lesser number of verdicts rendered in those years, unduly influenced the yearly average. The net result is that, with minor variations, there has been a gradual rise in the size of plaintiff verdicts from the average $2000 in 1927 through 1934 when the maximum average of $3248 was reached. Thereafter there has been an equally gradual decline through 1938 when the minimum average of $1562 was reached. The decline continued substantially until 1946; then there appeared a belated response to the rising cost of living.

The sudden rise in 1928 is doubtless because we were then approaching the break of our false prosperity so

that money appeared cheap and was readily distributed by juries and others as well. The sudden drop in 1929 was caused even more clearly by the great financial collapse, which affected practically our entire population.

The year 1942, be it noted, was the first of America's active participation in World War II subsequent to Pearl Harbor. While under the lend-lease program this country had for many months been attempting to become "the Arsenal of Democracy", it was not until Pearl Harbor, if not later, that our war production began to hit its stride. In other words, it was not until 1942 that the results of war production began to reach the public in the form of wages. This increase in wages was particularly noticeable in New Jersey, which, despite its relatively small size, was from the very beginning one of the four leading states in war production and federal expenditures therefor. Increased war wages were especially widespread in northern New Jersey, its greatest center of war production, where the courts and juries whose verdicts are the subject of this study are located. Clearly, therefore, the rapid increase in wages during the first six months of 1942 may definitely be considered to have been a cause of the sudden rise in the size of the average jury verdicts for plaintiff during such period.

Searching for Reasons for 1927-1934 Rise

Since the average size of plaintiff verdicts gradually rises from 1927 through 1934, the very time when the cost of living and price index are dropping, and since the verdict average generally drops thereafter, while a slight rise then appears in the cost of living and price index, these general economic situations are eliminated as a cause. That this fluctuation cannot be due to pure chance is evident from the fact that we are not dealing with a single casual verdict but with thousands of verdicts over a period of twenty years. We must turn elsewhere in search of a possible cause.

We should remember, of course, that this first period covers the end of inflation, the crash of 1929 and the somewhat panic-stricken years that followed. It was before the public became more philosophic in its acceptance of "hard times"—and before the relief system began to tide over the emergency. It was a matter of common knowledge to the juries themselves that the bulk of the cases were defended by insurance companies, and it would seem probable that the increase in the verdicts during these depression years was due to what the jury deemed to be the dire necessity of the plaintiffs and the relative lack of hardship of heavy verdicts upon the insurance companies. On the other hand, from 1934 to date, the public has become more and more educated to insuring its own motor vehicles and to the consequent fact that heavy plaintiff verdicts are reflected in heavy insurance premiums paid by the public, including the members of the jury themselves. This, added to the fact that relief had by that time largely cared for the emergencies of the public, would seem to offer a probable cause for the general decrease in the average size of plaintiff verdicts from 1934 through 1941.

Analyzing the Verdicts on the Criminal Side

We turn to a consideration of the analysis of jury verdicts in criminal trials. The analysis is based on a total of 36,253 criminal cases called for trial, all occurring in the same courthouse over a period of twenty years, 1927-47, and is compiled with the kind aid of the Essex County Prosecutor's Office.

First let us consider these trials from the aspect of the attitude towards the defendant. Of course, we must here bear in mind the fact that the state cannot win unless it has proved its case against the defendant beyond a reasonable doubt. Further, the state, on the one hand, will either have to move to *nolle pros* or to negotiate a guilty plea from the defendant if it does not think it can win, while, on the other hand, the defendant will have pleaded guilty if he does not think he has a reasonable chance of winning. Keeping in mind these facts, and the further fact that of the above total cases, 2327 were tried to a jury and the balance of 1676 to the judge alone on the defendant's waiver of a jury, it is interesting to note that during these twenty years and in these thousands of cases the jury found in favor of the state, subject to minor variations, approximately 70 per cent of the time.

The next question is how does the outcome in criminal cases tried to a jury compare with the outcome when the cases are tried, by waiver of the defendant, to the judge alone. In general, subject to minor variations, the outcome was favorable to the state a bit more often when these cases were tried to the judge alone than when tried to a jury. This confirms the old legal adage that one with a strong case should try it to the court and one with a weak case to the jury.

The next point of interest in this statistical analysis of criminal trials is its indication of how many, or how few, convictions in this metropolitan district are obtained by trial, as compared with those obtained on defendant's plea of guilty or the equivalent plea of *non vult*. During this twenty years and in this total of 36,253 cases, while there were some minor variations, on the average convictions by trial constituted eight per cent of the total convictions obtained. In other words, 92 per cent of those convicted of crime were convicted on their own plea of guilty. This is indeed a tribute to the efficient work of the prosecutor's detectives and police force in gathering the evidence against these defendants in such a conclusive fashion that they stood practically no chance of winning a not guilty verdict if they went to trial. For of course, while a defendant understands that he is likely to obtain a somewhat lighter sentence if he pleads guilty than if he goes to

trial and loses, every defendant naturally is much more interested in not being sentenced at all than in being sentenced lightly. So he is not likely to plead guilty, if he has even an outside chance of a not guilty verdict.

What Conclusions May Be Reached from the Study

In short, in this application of the law of averages to the results of our jury system, we reach in these simplest of cases the following at least tentative conclusions:

A. Correctness of Verdicts

That the verdict of the jury is approximately correct, as viewed from the standpoint of the presiding judge, slightly over 85 per cent of the time, both civilly and criminally.

B. Civil Jury Trials

1. That out of 3330 cases, the proportion of civil verdicts rendered for plaintiff, on the average, is nearly thrice that rendered for defendant, though here there is a definite fluctuation from year to year, the disproportion being much reduced in recent years.

2. That the size of plaintiff verdicts fluctuates even more than the proportion of plaintiff verdicts, this fluctuation in size, and perhaps in proportion, being greatly influenced at times by economic conditions, at times by the popular view as to the economic status of plaintiffs and defendants, respectively, as a class.

C. Criminal Jury Trials

1. Juries here find verdicts favorable to the state and against the defendant in approximately 70 per cent of the cases.

2. When the same class of cases is tried to the judge alone on the defendant's waiver of jury, the outcome is slightly more favorable to the state, on the average, than when the case is tried to the jury.

3. Out of a total of 36,253 cases moved for trial and analyzed, 92 per cent of those convicted were convicted on their own pleas of guilty, and but eight per cent by trial, with or without jury. This is a tribute to the preparation of the evidence in these cases as gathered by the police and prosecutorial authorities.

All in all, these many thousands of cases, both civil and criminal, indicate that when the jury system is applied to human situations of not too technical or complex a character, it results, on the whole, in realistic justice.

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1949 Annual Meeting and ending at the adjournment of the 1952 Annual Meeting:

Arkansas	Minnesota
Colorado	Nevada
Delaware	New Hampshire
Georgia	New York
Idaho	Ohio
Indiana	Oregon
Louisiana	Rhode Island
Maryland	Utah

West Virginia

Elections will be held in the states of

Indiana
New York
Oregon

for State Delegate to fill the vacancy in the term expiring at the adjournment of the 1949 Annual Meeting. State Delegates elected to fill vacancies take office immediately upon the certification of their election.

Nominating petitions for all State Delegates to be elected in 1949 must be filed with the Board of Elections not later than April 8, 1949. Petitions received too late for publication in the April Journal (deadline for receipt March 10) cannot be published prior to distribution of ballots, fixed by the Board of Elections on April 20, 1949.

Forms of nominating petitions for the three-year term and separate forms of nominating petitions to fill vacancies may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. *Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. April 8, 1949.*

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

Board of Elections
Edward T. Fairchild,
Chairman
William P. MacCracken, Jr.
Harold L. Reeve

10

Judicial Conference of the United States:

Report of Chief Justice Fred M. Vinson

■ The Chief Justice of the United States, on December 17, 1948, issued his report of the proceedings of the September, 1948, regular annual meeting of the Judicial Conference of the United States, composed by Act of Congress of each of the Chief Judges of the United States Courts of Appeals with the Chief Justice of the United States as its Chairman (United States Code, Title 28, § 331). Pursuant to law, that report, with its summaries of the state of business in the United States courts, and its recommendations of legislation relative to them, was transmitted to the 81st Congress by the Chief Justice at its opening on January 3. Highlights from the report are summarized by Leland L. Tolman of the Administrative Office of the United States Courts.

■ At the opening of the Judicial Conference of the United States, the Chief Judges of each of the eleven circuits were present except Chief Judge William M. Sparks of the Seventh Circuit, which was represented by Circuit Judge Otto Kerner. The Conference welcomed as new members Chief Judge Harold M. Stephens, of the District of Columbia Circuit, Chief Judge Joseph C. Hutcheson, of the Fifth Circuit, and Chief Judge William Denman of the Ninth Circuit.

As a memorial to the late Chief Justice Charles Evans Hughes, its Chairman for more than ten years, the Conference adopted the following resolution:

> The Judicial Conference of the United States notes with profound regret and deep sorrow the passing of Chief Justice Hughes, who presided over its sessions from 1930 to 1940. Seldom does it fall to the lot of any man to render distinguished service in so many different fields as did Chief Justice Hughes. As a practicing lawyer, as Governor of the State of New York, Associate Justice of the Supreme Court, nominee of his party for the Presidency, Secretary of State of the United States, member of the World Court and finally Chief Justice of the United States, he made a record as a lawyer, a statesman and a judge which is unique in our country's history. By common consent he is accorded a place among the greatest jurists of the English speaking peoples.
>
> One of the great services of Chief Justice Hughes to the cause of justice was that which he rendered as Chairman of this Judicial Conference, which had been created during the Chief Justiceship of his predecessor, Chief Justice Taft. It was during his Chairmanship that the Administrative Office Act was passed. Under that act the federal judiciary was freed from dependence upon an executive department of the government with respect to fiscal and administrative matters in the federal courts and was given adequate power of self-regulation and supervision. It was he who set up the Administrative Office and assured its success by bringing to its support his own splendid powers of administration, and it was he who, in the administration of the Rules of Procedure Act, secured for the country a modernized and efficient system of legal procedure in keeping with modern conditions which has revolutionized the practice of the federal courts.
>
> As a jurist, Chief Justice Hughes will rank with Marshall and Taney. As an administrator, he has never been surpassed by any man who has held judicial office in this country. The members of the Conference will always be grateful for the opportunity which was theirs to come in touch with his vibrant and forceful personality; and the judiciary of the country will ever be indebted to him for the service that he rendered in infusing the processes of justice with efficiency and order. He wrought mightily in his generation and has left a record of achievement which will be an inspiration for years to come to those who are engaged in the administration of justice.

The death of Circuit Judge Evan A. Evans, formerly representative on the Conference of the Seventh Circuit was marked by adoption of a memorial resolution as follows:

> Evan Alfred Evans was born on a farm near the small town of Spring Green, Wisconsin, March 19, 1876. His father, a Welshman by birth, came to this country early in life and served with distinction in the Union Army. His mother, also of Welsh stock, was a native of the State of Pennsylvania. [It seems noteworthy that twice in the year 1948, Americans have paused to honor the memory of judges with a lineage reaching back to the hills of Wales, Charles Evans Hughes and Evan A. Evans.]
>
> Good parentage, the give and take of living in a large family of brothers and sisters, farm life and small town life endowed Evan A. Evans with a down-to-earth knowledge and love of people and their daily concerns. [It is noteworthy also, as honors came to

him later in life, he held to the community in which he was born and maintained a home at nearby Baraboo until his death.]

This knowledge and love of people was accompanied by a gentle humor and a balanced view of life which was never to desert him, even through the exciting years which were to carry him to first honors in the Colleges of Liberal Arts and Law at his own University of Wisconsin.

His scholastic honors, and his interest and success at the University in debate and public speaking forecast his successful career as a lawyer; a career in which he was so successful that in the short period of sixteen years, and from a practice centering around the small town of Baraboo, he was to argue nearly a hundred cases before the Supreme Court of his state.

From such eminence as a lawyer he made the transition, without intervening office-holding, to the Federal Circuit bench for the Seventh Judicial Circuit in the year 1916, where he was to sit until removed by death on July 7, 1948. He became the Senior Judge in point of service in 1934.

His work on the bench is a matter of public record; but the zest which he brought to it may not be. In a talk before a Judicial Conference in the Sixth Circuit, he once remarked that never had he left the bench after hearing an argument that he did not wish to write the opinion therein. And we are told that the cases in which he sat as a Circuit Judge numbered over four thousand.

His attainments inside and outside his profession were great; his interests were broad; and his virtues many. But his associates of this Conference will probably remember him longest for his essential humanity—for his "plain and simple mental and moral excellencies" as a life-long friend once put it. His was a life of simplicity and straight thinking; of kindliness and humor—which was suffused with an innate, if informal, personal dignity. Even among judges, Evan A. Evans will probably be remembered longest as a man.

The death of Circuit Judge Francis A. Garrecht, who had represented the Ninth Circuit, was announced and the following resolution adopted in his memory:

> The members of The Judicial Conference of the United States with deep regret feel the absence from our meetings of the late Francis A. Garrecht.
>
> He brought to us the wisdom of the experience of his wide practice, beginning in the vanishing frontier of eastern Washington, in his helpfulness to and understanding of its Indian people, his vigorous service as a United States Attorney, and his long years on the Court of Appeals.
>
> We will miss the wholesome advice of his wide experience, his kindly personality, and his cheerful nature. We all unite in sending to the members of his family, our sympathy in the loss of their father and our friend.

The Conference also adopted resolutions to record its appreciation of the services as members of the Conference of Chief Justice D. Lawrence Groner, of the District of Columbia, who during the preceding year had retired from the bench; and of Circuit Judge Samuel H. Sibley, of the Fifth Circuit, who, at his request, had been relieved of his duties as Chief Judge and hence as a member of the Conference, by the Chief Justice pursuant to provisions of the United States Code which authorize that action.

The Solicitor General Presents Attorney General's Report

Solicitor General Philip B. Perlman, representing Attorney General Tom C. Clark, presented the Attorney General's Report to the Conference. After recording appreciation for the opportunity to participate, through the Conference, in the "development and improvement of the machinery for the efficient administration of justice", the report of the Attorney General proceeds to consider the observation in the report of the Director of the Administrative Office that there has been throughout the country a high incidence of disability of federal judges on account of illness, due in large measure to overstrain in work. This situation, the report says,

> emphasizes all too well the necessity for speedy appointments to judicial vacancies as well as the need for more judges to cope with the increasing burden of litigation in the federal courts. As far as filling judicial vacancies is concerned, the President has endeavored to fill each vacancy as rapidly as possible consistently with the established policy of securing men eminently qualified for judicial office. As for the necessity of additional judges, I shall continue to recommend the enactment of legislation increasing the number of federal judges where needed, so that the work of the federal courts can be carried on with dispatch, at the same time permitting the judges the necessary time for reflection and deliberation in judgment. Without a reasonably adequate number of judges to handle the volume of increasingly difficult litigation in the federal courts, the judicial system of the United States cannot properly perform its function, no matter how many times the court rules are revised or the statutes codified.

The Attorney General then referred to the recent enactment by Congress of the revisions of the Criminal and Judicial Codes, pointing out that they are truly significant advances in that they are now "the law" not "merely prima facie evidence of it" and will eliminate "the difficult task of tracing the provisions of a statute through all its amendments" in the often inaccessible Statutes at Large. In particular he mentioned, with approval, the new and clarified definition of "felony", "misdemeanor" and "petty offense" in Section 1 of the new Criminal Code, the change in punishments provided for conspiracy to commit a felony or a misdemeanor, in Section 371 of the Criminal Code and the provision in Section 36 of the Act (Public Law 773, 80th Congress) which embodies the new Judicial Code as its Section 1, which, repealing the rule of the decision in *Dobson* v. *Commissioner*, 320 U. S. 489, provides that decisions of the Tax Court of the United States are to be reviewed in the United States Courts of Appeals "in the same manner and to the same extent as decisions of district courts in civil actions tried without a jury".

Urges Adoption of Uniform Rules for All Courts of Appeals

Commenting on that part of the Report of the Director of the Administrative Office which urges the need for funds to permit the appointment of additional probation officers for the federal courts, the Attorney General pointed out that these officers, when supervising parolees, act subject to his direction, and that for this reason he has a special interest in them. As to this he continued:

> And, as Mr. Chandler points out, an efficient probation service, if ade-

quately supported, is the most promising means of rehabilitation. An efficient probation service can help prevent the probationer from ever becoming a parolee. I agree with Mr. Chandler that an average case load per probation officer of 114 persons under supervision, in addition to 106 investigations, is much too heavy a load to permit a really constructive job to be achieved. I agree that additional probation officers should be appointed. I feel sure that money so spent will prove in the long run to be an economy. Every case of a probationer rehabilitated who never has to see the inside of a prison constitutes a money savings to the United States. The benefits to society at large are so great and so obvious that nothing need to be said here in that regard.

The Attorney General's Report reiterated his proposal of last year for the adoption at an early date of uniform rules for all the courts of appeals, particularly with reference to the preparation and contents of records and briefs on appeal. He also suggested that in anti-trust cases, all district courts consider the desirability of assigning one judge to hear all matters in connection with the case, including all pre-trial motions and other preliminary questions, as well as the actual trial of the case, because in complex litigation of this type, the practice in multiple-judge courts of having the various preliminary motions heard as they come on from time to time by any judge who happens to be hearing the motion calendar is a burdensome procedure, requiring each judge involved to familiarize himself fully with the preceding steps and with the complex facts involved, and this will be saved if only one judge handles the entire matter. He noted that the practice of assigning anti-trust cases to a single judge has been used successfully in the Southern District of New York.

The Attorney General noted his agreement with the Director of the Administrative Office that the cost of service of process in civil cases where parties are located at a considerable distance from the United States marshal, is in some instances too high. He suggested that this expense might be reduced by a greater utilization of the provision of Rule 4 (c) of the Federal Rules of Civil Procedure providing for service by persons other than the marshal specifically appointed by the court for that purpose, and he noted the provision of the rule that "Special appointments . . . shall be made freely when substantial savings in travel fees will result". He suggested that the Conference call this matter to the attention of the district judges, and that he would then simultaneously circularize the United States marshals in reference to it in order to accomplish such savings as may be possible. The Conference later approved this suggestion.

Among the other observations of the Attorney General were the renewal of his interest in the enactment of a bill sponsored by the Conference relating to the care and custody of insane persons charged with or convicted of offenses against the United States; and of the Conference recommendation that the *per diem* limitation on subsistence expenses allowed federal judges while traveling on official duties be increased from ten dollars to fifteen dollars. He concluded his remarks by renewing the pledge of the Department of Justice of willingness to assist the Conference in any way possible in any matter involving the machinery of the federal judicial system.

Conference Urges New Judges To Ensure Efficiency

After hearing the Attorney General, the Conference turned its attention to a review of the state of business in the various United States courts. In doing so, it considered the report of the Director of the Administrative Office, which was summarized in the November 1948, issue of the JOURNAL (34 A.B.A.J. 1008). The report of the Chief Justice summarizes the facts thus disclosed, and it states that conditions relating to the courts in each circuit were discussed by the Chief Judge of that circuit and factors were considered which, because of their character, are impossible to weigh in statistical data. The availability of judges for assignments outside their own district was also discussed. The Conference then took the following action with respect to judgeships, noting that its recommendations in this regard "contemplated the absolute minimum increase in judgeships necessary to adequately man the courts, and to provide for the continued efficient and orderly processing of the business of the courts":

Courts of Appeals

Circuit:

District of Columbia—The creation of two additional judgeships.

Third—The creation of one additional judgeship, with the proviso that the first vacancy occurring on the Court shall remain unfilled.

Seventh—The creation of one additional judgeship.

Tenth—The creation of one additional judgeship.

District Courts

District:

Southern District of New York—The creation of four additional judgeships—one of which will provide for the filling of the vacancy created upon the retirement of the late Judge Woolsey, the filling of which has heretofore been prevented by statute.

Eastern Pennsylvania—The creation of two additional judgeships.

Western Pennsylvania—The creation of two additional judgeships, with the proviso that the first two vacancies occurring within the district shall remain unfilled.

District of New Jersey—The creation of one additional judgeship.

Northern Georgia—The creation of one additional judgeship. This will provide two permanent judgeships for this district, and restore the district to the status existing before the retirement of Judge Underwood.

Northern and Southern Districts of Florida—The creation of one additional judgeship for the two districts.

Southern Texas—The creation of one additional judgeship, and providing that the official residence of the judge shall be in the southern one-half of the district.

Eastern and Western Districts of Missouri—Making permanent the present judgeship which is now held by Judge Duncan.

Northern California—The creation of two additional judgeships, and the filling of the existing vacancy in the district without further delay.

Southern California—The creation of one additional judgeship.

District of Oregon—The creation of one additional judgeship.

District of Kansas—The creation of one additional judgeship.

The Director was instructed to present these recommendations to the Congress and to inform it that the prompt enactment of legislation necessary to achieve the objectives sought thereby was, in the view of the Conference, a matter of extreme urgency and importance to the judiciary.

Conference Acts on Salaries of Court Personnel

In reference to the court's supporting personnel, the Conference heard the report of its committee on that subject. The report of the Chief Justice discloses that the following action was then taken by the Conference:

(1) Directions were given that efforts should be made to secure increases in the salaries of the Director and Assistant Director of the Administrative Office "to the extent that their annual compensation will equal in amount that which is finally approved for officers of comparable rank in the other branches of the Government".

(2) Pursuant to the power newly given it by Section 604 (a) (5) of the revised Judicial Code, which authorizes the Director of the Administrative Office under the direction of the Conference to fix the salaries of law clerks and secretaries to judges, the Conference adopted a resolution, insuring to each judge the continuation of the right to classify, for salary purposes, his own secretary and law clerk, fixing salaries for the various classifications to which they may be allocated and providing that the aggregate amount allowable for salaries for secretaries and law clerks appointed by one judge should be $6700 ($200 more than previously) and for the Chief Judge of a circuit or of a district with five or more judges, an aggregate allowable amount of $9000 ($1500 more than previously). The resolution provides that it will become effective July 1, 1949.

(3) Approval was given to efforts being made to secure legislation permitting the judges' secretaries and law clerks, who have served four years and have been separated from the service involuntarily and without prejudice, to acquire civil service status for transfer to other government positions, upon passing a non-competitive civil service examination.

(4) Approval was given to the action of the Director of the Administrative Office in fixing the annual salaries of court criers at a basic amount of $1800, plus federal pay act increases, and placing them under the promotional plan applicable to other court employees.

(5) Recommendation was made that legislation be enacted to bring the probation office of the District Court for the District of Columbia, and the office of the Registrar of Wills of that District under the Administrative Office for administrative purposes, and to provide for the appointment of the Registrar of Wills by the District Court rather than by the President, as at present.

The report then summarizes the action of the Conference in reference to its recommendations of a year ago for legislation to increase the amounts available under existing statutory limitations for the reimbursement of allowable expenses incurred by judges and other court personnel while in an official "travel status". The view of the Conference is reported as follows:

> It was the sense of the Conference that the increase in costs of all "items of expense" normally incident to travel since the present statutory allowances were fixed, was sufficient justification for a reasonable increase in these allowances at this time; and that it was inequitable and unreasonable to require personnel while in an official travel status to assume a burdensome "out-of-pocket" loss in providing for their ordinary maintenance.

Accordingly, the Conference recommended the prompt enactment of legislation to provide: (1) an expense allowance not to exceed $15.00 per day for judges in an official "travel status", (2) an increase in the subsistence allowance for other Court personnel (now $6.00 per day) to either $8.00 per day or an amount equal to that which may be granted to employees of the executive branch of the Government and (3) an increase in the mileage allowance for use by court personnel of their privately owned automobiles while traveling on official business (now five cents per mile) to either seven cents per mile or a rate equal to that which may be established in the executive branch.

Federal Reporting System Is Discussed

In considering the court-reporting system of the federal courts, the Conference heard the report of its committee on that subject from its chairman, Chief Judge John J. Parker. Acting upon its recommendations the Conference authorized small salary increases for the reporters in some eight districts, but concluded that a general increase in the salary levels of the reporters is not at present justified. However, it gave approval, if the district judges so determine, to increases to be made by the individual district courts in the rates that may be charged by the reporters to the parties for transcripts ordered by them, "to be made with due consideration of the rate prevailing in the state courts, *provided*, that the rate shall in no case exceed 55 cents per page for original and 25 cents per page for copy, of ordinary transcript; 90 cents per page for original and 30 cents per page for copy of daily transcript, and further provided that the charge for daily or other expedited transcript shall be fixed by agreement of the parties subject to the approval of the judges, and, in lengthy cases, it should be fixed after the conclusion of the case with progress payments to the reporter, or deposits ordered by the court".

The Conference also directed the making of certain changes in the court-reporting arrangements in some six of the district courts. It concluded also that "the question as to the extent to which official reporters should be permitted to engage in outside reporting work was ordinarily one to be determined by the particular courts concerned".

Chief Judge Orie L. Phillips pre-

(Continued on page 172)

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"Books for Lawyers"

THE LINCOLN PAPERS: *Edited by David C. Mearns. New York: Doubleday and Company. 1948. Two volumes. Pages 681. $10.00.*

Many of us remember the breathless radio broadcasts from the Library of Congress on July 26, 1947, when, twenty-five years after the death of Robert Todd Lincoln, his collection of 18,000 documents was first opened for public inspection. Before that date, with insignificant exceptions, only Nicolay and Hay had seen these papers. A thorough search may somewhat change the verdict, but at present it seems extremely unlikely that there are any revelations in the collection that will make necessary any substantial rewriting either of the history of the period or of Lincoln biographies. So it is that no informed person would expect anything startling in the 500 letters down to July 4, 1861, embodied in this selection by the director of the reference department of the Library of Congress. Here are only a few letters from Lincoln, and of those addressed to him it is impossible to say how many he ever saw.

This does not mean, however, that this published selection is of no value. For in fact no one professing a general knowledge of Lincoln can neglect these volumes. For they are significant not only in the smattering of letters from obvious cranks to which all Presidents are subject, but because they reveal the great heart of America, Whitman's heart. And often the common men, whom God must have loved because he made so many, showed by their letters that they believed Whitman's words: "The President is in the White House for you. It is not you who are here for him."

In place of a modern filing system, Lincoln had roughly classified many of the letters by endorsing the envelopes with such words as "doctrine", "morality", "foolishness", "union", "appointments", "Sumter", "needs no answer", "family", "villainous articles".

In the last category might have been the letters not in this collection calling him an ape, baboon, satyr, monster, abortion, idiot, Negro; letters telling him he would be flogged and burned; sketches of daggers and gallows. Here too would be the one-page letter of ten lines using the word "goddam" from one to three times in each line, and one addressed to "Deformed Sir" electing him an honorary member of the Ugly Club and referred to by Sandburg. He was told to resign (pages 368, 403); bet $50,000 that if his government fought the Confederacy they would "take his scalp in 12 months" (page 544). He was asked for an immediate answer "without dodging or shifting" as to whether he favored "John Brown the traitor", whether he would vote "for Douglas the traitor", and if elected what would he do if the South would not submit to his inauguration (page 256).

In May, 1860, he was asked for old shoes or pants and "especially shirts or under clothing . . . for I desire to get as near your *hide* as I can" (page 247). In October, 1860, he was asked to go to the baggagemaster in Springfield to see if he could find a box checked there from Indianapolis the previous December (page 289). In December, 1860, another request was for his autograph recommendation of a lightning rod (page 329). And in June, 1861, someone sent him a sample of Dr. E. Cooper's Universal Magnetic Balm, "recommended for Paralysis, Cramps, Colics, Burns, Bruises, Wounds, Fevers, Cholera Morbus, Camp Disease, &c. &c. &c." with the request that he try it on his family and friends ("especially Gen. Scott") and write the sender about the result (page 637).

There were friendly letters such as one from one of Christy's minstrels telling how their funny men were giving him good hits from the stage and how they had taken the liberty of putting Lincoln's name in their bills (page 264). There were warnings against assassination and poisoning, including one based on the trance of a somnambulist (page 333). He was warned about passing through Baltimore on his way to take office, and a detour was suggested in "a false moustache, an old slouched hat and a long cloak or overcoat" (page 433).

All of us know how miserable he was made by office seekers who swarmed about him at Springfield, infested the private rooms of the White House, accosted him in the street so that in exasperation he said, "No. No. I won't open shop on the street". But some of the letters, if he saw them, must have appealed to his deep sense of humor. He would have seen the incongruity implicit in the application to be personal servant to him of one who had "lived with Lord Talbot de Malahide as footman" and been "travelling servant with Rt. Hon. Judge Ball The Lady Louise Tennison who is sister to the Earl of Leichfield and also with the Earl of Dunreaven" (page 348). And how flattering and what a comic relief there must have been in the letter from a friend of John J. Piatt who wanted Lincoln to give Mr. Piatt "a fine office" since the latter was "the most glorious literary genius in the whole country". Furthermore Mr.

Piatt, according to his importuning friend, was "engaged to the most brilliant poetess in all our land" who could not marry him until he obtained a position sufficient to support the two. To clinch the matter the letter concluded: "I think I can safely promise you, that, if you shall enable the two poets to marry, they will name their first boy either after you or me!"

Finally, among the importuning letters are those from an "Italian married lady" who had lost all her money in "Commertial speculations" and wanted the President to take care of a $1200 mortgage on her home near Rahway, N. J. Finally she wrote: "How a Great Personage like your Excellency! surrounded of glory and ornamented of fine education . . . Not answer a Lady letters . . . If all persons would not answer to the letters! the world will be fall in anarchy" (pages 448, 480).

And for its flavor we give this gem of December, 1860:

> My lincoln sir i this after Noon take the opertunit to rite A lettr to you I was very much pleased Whean I heard you was leced for our president for I don all I could to git you in to ofies I stude in the streats and hurade for you and waed in the mud sume the river to A Repubalican meeting and traveled a bout six weakes lectionneer for you and spent considerable pocet chane and yesterday I had a law sute with a democrat on presidence lection I bet 50 fifty dollars that you would be a lected and he bet the same amount that you would Not so when we heard that you was leced I toled the Gentleman that I wanted the money and he refused paying it and one word brot on a nother tel at last I nocked the gentleman down and so you see he tuck the law on me and it Cost Me 50 dollars so Mr. lincoln I have don my part for you I think you ar in debt to me for my Cindness to you
>
> pleas ancer this lettr.

This, too, must have been a gem for Lincoln.

Lawyers will be interested in the letter from Ward H. Lamon to Lincoln from Danville, Illinois, November 21, 1854:

> Our Clark v. Hoxworth et al suit was again continued—owing to a misdescription of the land. You did not describe the land as it was in the Mortgage—I asked leave to amend the bill—would I not better require them to answer under Oath. They deny everything (page 197).

And in a long and friendly letter criticizing Lincoln for his manners, dated May 18, 1861, a correspondent says:

> A lawyer in his office can put his feet on a table higher than his head, if he wishes to. But he cannot come any such performance as Commander in Chief of the Armies of the United States in their presence.

As these samples indicate, the Mearns collection is well worth reading.

BEN W. PALMER
Minneapolis, Minnesota

RADIO AND TELEVISION LAW. *By Harry P. Warner. New York: Matthew Bender and Company. 1948. $35.00. Pages xii, 1095.*

The role played by the Federal Communications Commission in the development of radio broadcasting has not been fully appreciated or understood by those within and particularly without the Government. Since 1927, the Commission has increased its regulatory activities and control over all phases of the broadcasting industry. A few examples will suffice. The promulgation of the Commission's famed Bluebook has or will result in the indirect prescription of program standards. The network regulations control the contractual relationships between networks and their affiliates. The proposed regulations banning the so-called "give-away" programs will have important repercussions on the structure and business practices of the broadcasting industry. And the efforts of the Commission to limit the number of broadcasting stations that may be owned or controlled by a single interest is of tremendous significance in the curtailment of monopolistic practices and the latter's effect on keeping open the avenues of communication to the public.

The immediacy of television with its multifold legal problems bespeaks the need for a critical and scholarly analysis of the activities of the Federal Communications Commission in the broadcasting and television fields. This need has now been supplied by Harry P. Warner's 1100-page book, *Radio and Television Law*. Mr. Warner is well qualified to write this book, having specialized in this field for many years; he has been a member of our Association's Committee on Communications Law, and is presently Chairman of the Committee on International Communications of the Section of International and Comparative Law.

A novel feature of the book is that each of the chapters begins with a legislative history of the subject matter involved. For example, in the chapters on program standards and judicial review, there is a comprehensive discussion of the legislative history of the pertinent statutory provisions. This is followed by the administrative regulations implementing the statute and the administrative interpretation of the statute and regulations as exemplified by the Commission's case law and judicial decisions. One illustration will suffice.

Section 315 of the Act, referred to as the "political section", requires stations to furnish equal time to opposing political candidates. At the outset the author has furnished a detailed legislative history of this section from its first appearance in legislative form. This was prior to the Radio Act of 1927. The administrative regulations implementing the statute are quoted in their entirety with a brief discussion of the factors prompting such regulations. This is followed by a case history of the regulations in question.

The chapter on practice and procedure describes the internal organization of the Commission and quotes the "working rules" of the Comission, augmented by the administrative interpretation thereof. The practice and procedure is further analyzed, discussed and evaluated against the pertinent provisions of the Administrative Procedure Act. This chapter contains a discussion of the current problems of practice

and procedure as exemplified by recent decisions of the Supreme Court of the United States.

Chapter II, on the administrative process, furnishes a case by case analysis, both administrative and judicial, of the Commission's policies. This has reference to factors, such as financial qualifications, character, local residence and integration of ownership, which have been utilized by the Commission in comparative hearings. There is a layman's explanation of how broadcasting works, an explanation of the Commission's allocation policy, the pertinent rules, regulations and engineering standards with the administrative interpretation of the same. The author has followed the same chapter sequence in the chapters on frequency modulation and television.

Chapter III, devoted to program standards, furnishes a detailed study of the regulatory approach on this important subject. Such topics as lotteries, advertising, obscenity, the Bluebook, defamation by radio and controls exercised by other administrative agencies such as the Food and Drug Administration and the Federal Trade Commission are discussed and evaluated fully.

There is a dearth of literature on the how, why and what of the network regulations. Chapter IV, entitled "Network Regulations", furnishes a full explanation of the network regulations and their economic and legal effect on the broadcasting industry. There is a chapter on the transfer of license and on frequency modulation and television.

There is but one chapter on television, and that deals primarily with its background and history, the current allocation policy, the current rules and regulations and such of the administrative policies as there are in the field. The author intends to keep the volume up to date by supplements with particular emphasis on television. It has been announced that the first supplement, in addition to bringing all annotations up to date, will contain the following new material: the use of television film and the problems involved in the drafting of television film contracts; a section on property rights in television broadcasts; a section on television and the right of privacy; and a chapter on facsimile. As television cuts across other branches of law, viz., state control of television film through boards of censorship, copyright, etc., new sections are to be added.

The chapter on judicial review reviews the relationships between the Commission and the courts since the inception of federal control of broadcasting. A novel feature of this chapter is an analysis of the judicial review provisions of the Administrative Procedure Act in relation to the Commission.

There is a general chapter on the legislative history of all radio legislation since 1910. The final chapter discusses the various proposals to amend the Communications Act of 1934 with a section-by-section analysis of the White-Wolverton bill recently introduced in Congress. Mr. Warner urges that amendatory legislation be enacted to cure procedural deficiencies in the Act and that substantive legislation also be enacted to clarify the Commission's authority in such controversial fields as program standards, network regulation, sales price of broadcasting stations, newspaper ownership of broadcasting stations, etc.

The appendix reproduces the Communications Act of 1934; there is an excellent and comprehensive index of over 150 pages.

This is the most comprehensive volume in the field to which it is devoted. All lawyers who want an all-inclusive work on the legal phases of radio and television will find this work the answer to their needs. It is well-written and well-documented with references to the cases, administrative rulings and other authorities, and will be an invaluable aid to the general practitioner with occasional interests in radio and television and a *must* for the specialists in this field.

CHARLES S. RHYNE
Washington, D. C.

JUDGE JEFFREYS. *By H. Montgomery Hyde. With a Foreword by The Rt. Hon. Sir Norman Birkett, P. C. London: Butterworth and Company. 2/10. 1948. Pages 328.*

The original edition of this lusty chronicle, first published in 1940, became quickly a casualty of the war. The publisher's plant was destroyed by enemy action; the book went out of print and copies became collector's items. Now it has made what to nearly all readers on either side of the Atlantic will be its first appearance. Changes from the original text are few, but there is the welcome addition of a foreword from the brilliant pen of Birkett, who had told me about the work when it was first issued and has now dispatched a copy.

Already the book is securely established as the authoritative biography of the extraordinary lawyer and judge whose name has passed into history as the proverb or synonym for judicial savagery, depravity, corruption, even barbarity. The gifted historian, H. Montgomery Hyde, with all resources and habits of research through history and literature, has written a portrayal of absorbing interest and high literary craftsmanship.

To the average reader of some familiarity with British legal history, the name of Jeffreys is forever linked with the Western Circuit of 1685—"the Bloody Assizes"—but here is the unparallelled career of Jeffreys in full perspective, the tale of a lawyer so able and so infamous that he was a Bencher of the Inner Temple within nine years of call to the Bar and was seated on the Woolsack and of the Peerage at the age of forty, within seventeen years of call. All this is against the background of vivid narration of the characteristics of the era and of the legal system operative in England in the time of Charles II and James II. Withal it is a dramatic tale, for the powerful judge who had sent many to torture and death became himself a fugitive and then a broken prisoner in the Tower of London, saved by death due to

his own malady from death in a still more horrible fashion deemed called for by his crimes.

Errors and distortions and malignancies in the writings of diarists and historians are examined and refuted by Hyde. Macaulay's inventions are rejected. Hyde goes solidly beyond what the late Lord Birkenhead did in his brilliant but brief appraisal of Jeffreys in *Fourteen English Judges* (1926), which called attention to Jeffrey's abilities and merits as a lawyer, along with his iniquities. Hyde does not attempt to overturn the verdict of history as to the brutal Jeffreys; but he reveals him as a human being, possibly an understandable being, not a monster. Perhaps many of his offenses in misuse of judicial powers and process were of degree and force rather than of kind and principle, as compared with perversions which have been witnessed in much later times. Hyde makes no plea for a "new fair deal" for Jeffreys, but one may lay down this volume with a feeling that Jeffreys has at last been made a reality, not an ogre of an era antedating law and justice—in truth a very human judge despite the brutality of many of his acts and the baseness of most of his motives. Perhaps without intention on the part of the author, Jeffreys emerges as the type of judge who may serve a "police state", a land where the rights of men are deemed to flow only from a ruler or a government which can ruthlessly deny rights and fair play and do it as casually as it prates of them and cajoles the votes of minorities by proclaiming rights in high-sounding declarations. Do not judges and government-controlled legal systems exist today whose motivations and acts as to the lives and rights of men have been as brutal and unconscionable as were those of Jeffreys long ago? Has not the cycle of time brought commissars of this ilk again into places of power? Even in high posts as to which their domination is not yet condemned fully as being what it is? What "Bloody Assizes" and worse took place in Hitler's Germany and in Russia, Poland, Czechoslovakia and the Baltic States, and are still taking place behind the Iron Curtain in the war which totalitarian collectivism wages on church and religion, family and untrammelled education, freedom of conscience and opinion? In any event, the England which produced and tolerated Jeffreys for a time has gone on to produce generations of bold and able judges; and many persons who are not lawyers will find Hyde's work and Birkett's foreword interesting and significant reading at this juncture when the ingrained sense of justice, the independence and the unswerving fidelity of British judges chosen only for their competence, stand as bulwarks of the rights of persons in an era when the socialization of enterprises and the ascendancy of government employees as political forces might otherwise endanger the cherished traditions of liberty in England.

W. L. R.

CASES AND OTHER MATERIALS ON PRIVATE CORPORATIONS. *By I. Maurice Wormser and Judson A. Crane. Indianapolis. Bobbs-Merril Company. 1948. $7.00. Pages 1068.*

Corporations have had a most essential part in the development of our industrial civilization and of the high standards of living we have attained in this country. Without limited liability of individuals and large aggregations of capital, made possible by the legal concept of the corporate entity, the great production of the twentieth century could never have been achieved. The role of corporations, even in the atomic age that we may soon be entering, is not likely to be less important. Thus the significance of this subject to law students and lawyers is obvious.

This new book, *Cases on Private Corporations,* by I. Maurice Wormser and Judson A. Crane, is timely and well prepared. It is based on the third edition of Canfield's and Wormser's *Cases on Private Corporations,* as revised in 1932. Since that time many states have revised their corporation codes and there have been new significant decisions in this field. The authors have brought this book up-to-date by including materials which their experience as teachers of this subject have led them to consider of importance to their students. Footnotes cite comments and case notes from current legal periodicals, as well as recent decisions, which again emphasizes the importance of law review articles as necessary materials for both lawyers and students.

The former work has been thoroughly modernized. Basic problems are recognized and covered by including the leading cases from the older revision. New decisions are included under the appropriate subtopics or cited in footnotes. Recent statutory provisions, from the revision of the corporation laws of many states, are quoted or cited. Some additional subtopics are included in editorial notes. The former subtopic of reorganization has been omitted because it has now become almost a complete subject in itself. The book covers the fundamental principles of corporations, their formation, powers, management, rights and liabilities of directors, shareholders and creditors, dissolution, merger and consolidation. It seems to present adequately up-to-date materials for a general course in this important subject.

LAURANCE M. HYDE
Supreme Court of Missouri
Jefferson City

INNER TEMPLE PAPERS. *By Sir Frank Douglas MacKinnon. London: Stevens & Sons, Ltd. 1948. 21 Shillings, ($4.24). Pages 236.*

For anyone who has spent time for study or moments of travel in and about the Inns of Court area in London, *Inner Temple Papers* will furnish quaint detail reviving memories of the past.

It will be remembered that the so-called "Temple Bar" where the London courts are situated embraces four Inns of Court. These are the organizations which aspirants join in preparation for careers at the Bar. Tradition requires actual dining at the

Inns for a minimum number of meals. Customarily, a student will join that Inn in which a parent or ancestor has been a member. Centuries of history brought these Inns to the present moment. The Inns are known as Inner Temple, Middle Temple, Lincoln's Inn, and Gray's Inn.

I spent considerable time in barrister's chambers at Pump Court in Middle Temple, and recall well the damage wrought by German bombers in the "blitz" over London. The Templar's Temple was in ruins. One could well visualize the Crusaders marching down the walk to the Thames River Embankment en route to battle for the Holy Land against the pagans. World War II saw formations of destructive German planes massing over this same area. The libraries and Inns met a tragic fate. It was as though the Germans deliberately sought to destroy the seat of English liberties and traditions in attacking the law courts, the lecture halls and Inns—the nurturing sites for ancient personal freedoms, tolerance and justice.

Sir Frank Douglas MacKinnon retraces the splendid history of Inner Temple as though he desired to frustrate any notion that his Inn was ever doomed through military destruction. As a Master of the Bench of Inner Temple he makes the Inner Temple live and breathe. He permits the old Benchers to speak through the papers they left and the records maintained throughout the generations. Men of politics, literature, government and finance have known this sanctuary of law: Sir Edward Coke, Charles Lamb, Samuel Salt and Thomas Coventry, among many others.

Inner Temple Papers is a scholarly work. It relates minute details of many things: inscriptions, symbols of the Inn, the traditions and customs, anecdotes about Readers, Benchers and their Coats of Arms. Architecture of the various structures is given special attention. The author is not without courage to criticize some of the architecture of his beloved Temple. The magnificent library collection receives particular treatment. Many valuable portions of the collection were lost during German bombardments. One senses not a little sentimentality in the author as he turns the pages in the history of his alma mater, the Inner Temple.

The volume includes eleven plates showing "before and after" illustrations of Inner Temple scenes and structures. They give realism to the narrative. The American Bar Association may well be proud of its part in restoring the Inns to their former state by its sponsorship of donations for the cause. If any inspiration is needed, it can be found in the quiet resolve expressed by Sir Frank Douglas MacKinnon in his concluding paragraph:

> Anyone who goes into the Temple and views the devastation in its buildings might suppose that by an irony of fate (for one cannot attribute design to the bloodthirsty assailants) things of beauty had suffered, while that which is hideous had escaped. The Master's house and Nos. 5 and 6, Fig Tree Court, are heaps of rubble, while Farrar's Building and Temple Gardens are almost intact. I am glad to think that the like fate has not come to our books. But, though our chief treasures had been removed and so were saved, our losses of books are very serious, and we are now addressing ourselves to the task of replacing them.

The devotion of a man for the Mother of his legal learning is inherent in this chronicle. Told in detail and with patience, it is worth the reading for those having an interest in the sources from which our American jurisprudence was created. *Inner Temple Papers* is such a source.

IVAN L. MILLER

Cleveland, Ohio

TEMPLE BAR TAPESTRY. *By Simon Dewes. London: Rich and Cowan. 1948. $4.00. Pages 189.*

One of the most charming books which has come out of London since World War II is this story of the London that lies between St. Paul's Cathedral and Aldwych, containing famed coffee houses, taverns, churches and prisons, as well as Temple Bar and the immortal shrines of the common law in the Temple. Tales of the lives of the men and women who in the seventeenth and eighteenth centuries walked these streets since war-torn are made alive again and are woven into a delightful tapestry of London's history, literature, law and romance—rogues and heroes, wits and writers, lawyers and lovely women—tales of the Temple and Devil Tavern and the Law Courts, Cock Tavern and the Kit-Kat Club, Sir Christopher Wren's deathless architecture, the gay literary adventurers of Fleet Street from St. Paul's and La Belle Sauvage to St. Clement Danes and Butcher Row and Lincoln's Inn in the 1700's. Few lawyers who cherish the heritage and the lore of their profession will lay this volume aside once they have browsed in its pages.

W. L. R.

ARTHUR TWINING HADLEY. *By Morris Hadley. New Haven: Yale University Press, 1948. Price $3.75. Pages 282.*

A distinguished practicing lawyer here writes warmly, pleasantly and authoritatively of his eminent father. President of Yale from 1899 to 1921, Dr. Hadley stirred the ferment of American education, in a critical period, with a mighty and skillful spoon, adding seasoning of his own devising. The resulting brew attested the worth of his individuality and effort. This book should interest all sons of Eli and all others concerned with the functioning of the endowed university in a free society.

ALBUM OF AMERICAN HISTORY: VOLUME IV—END OF AN ERA. *James Truslow Adams, Editor-in-Chief. New York: Charles Scribner's Sons. 1948. Price $7.50. Pages xii, 385.*

A U. S. Signal Corps photograph of American riflemen charging "Into a New World" across a French field in 1917 brings to a close the fourth

and final volume of the pictorial history of America from 1492. Earlier volumes covered the colonial period; the birth and expansion of the new nation (1785-1853); conquest of the continent, civil strife, industrial revolution (1853-1893). The whole series contains over 5000 pictures. In the current volume the reader progresses racily from the first election of Cleveland, through the "not so gay" nineties, into the new century with its "strenuous life" and "New Freedom". American manners and *mores* of an earlier day are pictured and described in a way which will induce nostalgia among those who recognize familiar scenes.

ALL MEN ARE LIARS. *By John Stephen Strange. Garden City, New York: Doubleday and Company (Crime Club). 1948. $2.00. Pages 191.*

Aside from a title which lacks discernible appropriateness, this tale of a murder, investigation and dramatic trial is likely to be enjoyed by lawyers who find relaxation in "whodunits". The locality is New York City and the scenes are familiar to many who know their metropolis. The author expresses "his sense of obligation to Mr. William M. Wherry", well known at the New York Bar, "for his courteous assistance in making possible this book", to Judge Mitchell May, of the New York Supreme Court (Kings County), "for his invaluable contribution of background and ideas, and to Mr. Whitman Knapp, Mr. William J. Keating and Mr. Edward Perry, all of the New York District Attorney's office, for their kindness in supplying information concerning the methods of investigating and trying criminal cases in the County of New York".

Again noting the title of the tale, I report here that the author is in fact the wife of a physician engaged in the scientific research of his profession—he is of a Southern family which bears a name which in two generations has been favorably known in the law and our Association. Since she has not disclosed her identity, I shall not end her anonymity. At risk of creating doubt as to the accuracy of the assertion in the book's title, I state that her present work is notably better than those we have read among many she has written. The assistance given her for this story appears to have consisted principally of opening doors of opportunity for first-hand observation of the methods of investigating a homicide, coming to a conclusion as to guilt, marshalling the evidence to sustain or defeat an indictment and proving the case for the prosecution and the defense in court.

A great deal of the author's observations appears to have taken place in and about a recent metropolitan trial of some notoriety, although the parallel between the actual crime and trial and that chronicled may not readily be noted. As I do not understand that the processes of the criminal law in that recent local case have surely come to an end, I shall not here comment on it or the author's use of it. She has written a readable and competent account of the investigation and trial, and her indictment of the male sex in entirety is not directed particularly against lawyers.

W. L. R.

Administrative Law Contest Extended: Local Prizes To Be Awarded in Many States

▪ The Section of Administrative Law of the American Bar Association has announced that the closing date for submitting essays has been extended from December 31, 1948, to September 1, 1949. In conjunction with this step the eligibility rules have been revised to admit as contestants members of the American Bar Association elected prior to August 1, 1949.

It will be of interest to contestants to know that the West Publishing Company has generously authorized an increase of $500 in the grand prize, making a total of $1500 for the First Prize, and has further authorized a $500 Second Prize. In addition, the following states have authorized local prizes for the best essay submitted from the state:

Arizona	$100
Arkansas	$200
Colorado	$150
Delaware	$ 50
Minnesota	$100
Nebraska 1st	$100
2d	$ 50
New Hampshire	$100
New Jersey	$100
New York	$250
Oregon 1st	$150
2d	$100
Pennsylvania	$250
Texas	$500
Virginia	$100
West Virginia	$200

It is expected that the complete contest rules, revised and clarified *as to detail* in the light of experience to date, will be republished in the March issue of the JOURNAL. In the meantime, inquiries concerning the contest rules or the contest generally should be addressed to Omar C. Spencer, Chairman, Contest Committee, Yeon Building, Portland 4, Oregon, or to J. Tyson Stokes, 123 South Broad Street, Philadelphia 9, Pennsylvania, the newly appointed Co-Chairman of the Contest Committee.

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■ *Regional Group Conferences Under Way*

Commencing in the months of February and March, representative groups of lawyers in at least twenty cities of the United States and six in Canada will come together to discuss and summarize orally the results of their examination and study of several little known documents of very recent origin—documents which present important questions of constitutional law under the American system and are bound to have effects on the thinking and action of governments and peoples in many parts of the world. It is a significant and salutary thing whenever lawyers of Canada and the United States give contemporaneous consideration to legal questions of mutual interest and common concern. This time their study and discussion are devoted to the great subject of the rights of men and the ways and means by which those rights may most soundly be vouchsafed and protected, even against governments.

From the studies which will take place first in these Regional Group Conferences under the auspices of our Association and the Canadian Bar Association, respectively, there will come the information and the understanding which will enable discussions in larger groups and meetings in many communities and thereby will assist in the creation of an informed public opinion as to matters which in 1949 and 1950 will be before the Senate and people of the United States and before the Parliament of the Dominion of Canada. It is doubtful if in many years there have been issues as important concerning which there has been such a paucity of public information and such a lack of public realization of the far-reaching consequences of what has been broached and is being done without being understood by the people.

The House of Delegates of our Association took emphatic action last February 23-24, concerning some phases of the projected Covenant on Human Rights, particularly as to the new methods and agencies proposed for implementation (see 34 A. B. A. J. 277, 301; April, 1948). The House of Delegates in Seattle in September, and the Canadian Bar Association in Montreal last August, took action as to the proposed Declaration of Human Rights (see 34 A. B. A. J. 894; October, 1948). The final text of the Declaration as rushed to approval in the General Assembly in Paris in December—in a changed form which the lawyers in this country had not seen at the time the approval was voted—was published in full in 35 A. B. A. J. 32; January, 1949. The present unrevised form and text of the Covenant, which is now to receive accelerated consideration, were given in 34 A. B. A. J. 202; March, 1948, with a summary of the implementation measures then proposed as to which our Association expressed vigorously its considered views.

The questions of what should be the contents and text of any Covenant at this time, and of what mechanisms and measures should be set up to implement and enforce it, will be considered in all of the Regional Group Conferences this winter and spring. The form in which the Universal Declaration of Human Rights was promulgated by the General Assembly of the United Nations and what that document portends will be actively discussed. Also placed before the Conferences as a part of the picture of what is taking place in the world on this subject will be the Convention for the Prevention and Punishment of Genocide, which also was adopted in Paris in a form which had not been studied or received in this country.

The Genocide Convention will be submitted to the Senate of the United States in 1949 for ratification, and implementing legislation that will necessarily break new ground and invade the domains of state legislation will be asked for, from the present Congress. The Declaration will not be submitted to the Senate of the Congress for ratification or approval, but will doubtless be cited and quoted for many years, whenever drastic legislation or action is urged on many subjects. The projected Convention on Human Rights could hardly be submitted to the Senate for ratification before 1950, if it were rushed to completion and passage by the General Assembly at Lake Success late in 1949; but it will be a better, wiser document if it is more carefully considered and is held for action by the General Assembly in 1950. The Covenant and the Convention, if ratified,

will become a part of "the supreme law of the land", paramount to state constitutions and laws and to federal laws not in accord with it.

These are new and vital documents of vast import and impacts. Very little is known about them by many lawyers; still less, by our people. There could be no more appropriate or important task than that to which our Association has devoted itself, through its Committee for Peace and Law Through United Nations, in bringing detailed information and reasoned opinions to lawyers in many parts of the United States, as the first steps toward a fuller understanding of these matters by the lawyers and by our people as a whole. There is great need that lawyers and people should understand what is involved in these far-reaching proposals, which have been rushed at a pace which aroused the protest of our House of Delegates and the repeated protests of President Holman. This work of carrying this information to the home communities is a formidable task, but it is one which is not likely to be performed at all unless it is accomplished by the energy, public spirit and disinterestedness of the organized Bar.

■ *The Court and the Popular Will*

This issue carries the last of the eight discussions originally projected and submitted by Ben W. Palmer. Because of the interest in these articles and the discussions which they and the editorials which accompanied them have evoked, the JOURNAL asked Mr. Palmer to close his series with a further article containing a summing up of his points and a statement of his conclusions. As we declared at the outset, such discussions as have been taking place are necessarily rather general and somewhat abstruse or abstract. Mr. Palmer's final analysis and conclusions should tend to make them more specific and more definitely practicable. It has been and is our hope that the interest of the profession in the history and philosophy of our jurisprudence and Constitution has been aroused and revived. The intense commercialism of modern practice and the trend to pragmatism and positivism have tended to neglect and discredit such history and philosophy. It is our belief that we cannot continue the blessings and benefits which we have enjoyed in this country if we allow to be undermined the foundations upon which our nation was built.

In his present article Mr. Palmer discusses "The Court and the Popular Will". This brings us to the consideration of two fundamental questions about which there is much confusion and as to which there is urgent need of clear understanding. What as to juridical matters is the power of the people as expressed through electoral and deliberative processes? And what is the function of the Court? Are there limitations upon the preponderant will and conscience of the people, when deliberatively ascertained? If so, what is then the duty of the Court? Are there rights of persons and of states that are beyond the power of majorities or of all

the people to change, while our form of government endures?

To answer these questions it is necessary to understand the philosophy which motivated the founding fathers. They founded this nation upon a system of checks and balances. First there was a balance between the one, the few and the many. They knew that government to be efficient should have an executive head with authority to act where prompt action was required. They knew also that the legislative functions of government required study, deliberation and consultation. The legislative power was therefore vested in representatives of the people. Other powers, however, were reserved to the people themselves, such as the selection of representatives and the determination of questions of broad policy.

The next balance was between departments of government—the executive, legislative and the judicial. Definite restraints were imposed upon the executive and the legislative departments, by providing first that the officers of those departments should be chosen at frequent intervals by the people and next that their acts should be subject to judicial review. An independent judiciary was then established with authority to restrain abuse of power by other agents of government. The judiciary itself was restrained from arbitrary and oppressive power by the strict limitation of its activity to the judicial function. Courts were not authorized to initiate or execute measures. They were empowered merely to determine questions presented in the course of judicial proceedings. With the delivery of judgment the court's power came to an end.

There was a third balance, that between state and national governments. Local self-government was preserved by restricting federal action to such matters of national concern as were entrusted to the national government by the Constitution.

It is therefore apparent that absolute power was not vested in any group or any department. The framers of our Constitution knew that government was necessary. It was therefore their aim to establish an efficient government. History, however, had taught them that it was the tendency of governments to become arbitrary and oppressive, and they attempted to limit this tendency by establishing a Constitution and investing a judiciary with authority to restrain any violation of its provisions.

Our Constitution is based upon a profound understanding of human nature. Every normal individual is subject to two impulses: the impulse to do as he pleases, and the impulse to do as he ought. The one impulse is arbitrary; the other is reasonable. The wisdom of ages has crystallized in the adage that "A wise man does what ought to be done". Man's reason and experience have taught him that there is a higher law which cannot be violated or disregarded with impunity. This has been referred to for centuries as natural law; and it was recognized and acknowledged by the men who drafted the Declaration of Independence and the Constitution. Their intent and their effort was to establish a government which would be free from capricious conduct and regulated wholly by law.

They knew also that the impulse to do as one pleases increases with the increase of power. History revealed to them that those who had opposed arbitrary and oppressive power in others adopted arbitrary and oppressive methods when they in turn became invested with power. When the Parliament of England had won its fight against the absolute sovereignty of the Crown, it in turn assumed absolute parliamentary sovereignty. The revolt of the Colonies was against such assumption of power by Parliament.

The founders of our Government imposed every reasonable restriction upon government to insure the people against despotism—even the despotism of the casual majority or the mob, the political pressures that are confused as the deliberative will of the people. It was the desire of the founders to establish a government which would be motivated by reason, not arbitrary will, and it should be constantly borne in mind that they recognized the danger of arbitrary action no matter by whom exercised. As stated in the *Federalist:*

> The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

Madison, the Father of the Constitution, expressed grave apprehension of the tendency of the popular element to extend the sphere of its activity and draw all power into its "impetuous vortex".

There is a tendency today to pamper and pander to so-called popular will, usually political will or self-interest in ill disguise. History reveals that this tendency leads to the disintegration of government. The people themselves, if they wish to maintain a government that is not of men but of laws, must accept the fact that they and their electoral majorities, no less than the king, are under God and the Law.

Now this consideration of the philosophy and framework of our Government reveals at once the true position and function of the Supreme Court. Mr. Palmer is exactly right when he quotes the statement that "the Court has no reason for its existence if it merely reflects the pressures of the day". Furthermore, the Court would exceed its authority and violate the trust reposed in it if it should attempt to give effect to supposed popular or political opinion against the express provisions of the Constitution, or to attempt to amend the Constitution by interpretation, or to usurp the functions of the legislative department. The people have power to amend the Constitution, but only in the manner which the Constitution provides. Neither the Court nor the Congress should arrogate to itself the power to amend.

Now it is apparent that if the Supreme Court is to perform its function according to the Constitution, it

must be made up of men who are familiar with the history of our jurisprudence and our constitutionalism, and who are impersonal, impartial, courageous, trained in the law and consecrated to judicial service. Partisanship or bias corrupts the judicial office. That is why it is a gross error to appoint partisan judges, and why that error cannot be corrected by other partisan appointments from some opposing faction or party. The judges' full allegiance must be to the law, for there is the only true sovereignty.

■ *Stating International Law*

American lawyers look forward with keen and hopeful interest to the convening on April 11 of the International Law Commission created and elected by the General Assembly of the United Nations to fulfill the mandate of the Charter for furthering "the progressive development of international law" and its statement and codification. The new agency of peace and law in the world will hold its first session at Lake Success on April 11. Our own Manley O. Hudson was elected as the member representing the United States.

To many jurists and lawyers, the disappointing and baffling thing, ever since the structure of the United Nations was brought so hopefully into being as a federation of the nations with the World Court as an integral and principal part of its processes for settling disputes between nations, has been the seeming indifference of nearly all nations to the strengthening of the rule of law and to resort to the Court, along with a vast increase in the number and the acrimony of the seething disputes which have been kept at the political level and in the hands of men who have not shown capacity to solve them by debate and negotiation.

When the Charter and the strengthened Statute of the World Court were put into effect, nearly everyone hoped and expected that substantial further progress would be made toward law and adjudication in the international sphere. Instead, there appears to have been little attention or emphasis given thus far to the known and established principles of international law as a means of peace and order among nations. The effort seems to have been mostly to create new and untried concepts and mechanisms whereby individuals may bring themselves into controversies with their own country and other countries and whereby international condemnation and punishment may be inflicted on individual citizens of a state by the initiative and action of groups of individuals in another state.

Hope for the saving grace and force of international law backed by the moral judgment and conscience of mankind has not died in the world. The new International Law Commission will carry into its work the hopes and prayers of many Americans and will deservedly receive from the start the staunch and active support of our Association and its members.

■ *Needed—A New Court*

The need for an adequate body of international law—adequately known and adequately respected—requires no demonstration for even casual students of recent history. The events of 1914-1918 and 1939-1945 illuminate the thesis all too brightly. How to get it is another matter.

As remarked by Robert B. Ely III elsewhere in this issue, the United Nations' International Court of Justice cannot satisfy the need for two principal reasons. First, its jurisdiction is limited to disputes among states, and then is only "contingently compulsory". Second, it is hamstrung by the veto, which can prevent not only the remodeling of the Court to give it the necessary scope and force, but also the creation of any effective system of enforcement.

Mr. Ely perceives, then, the need for a new court within the United Nations' framework—an International Court of Civil Appeals. The court would be established, with consent and approval of the United Nations Assembly, through execution of a protocol for a statute of the Assembly, by a group of nations with similar legal systems. The court would receive, by certification, cases from the courts of last resort of the participating nations in which had arisen questions involving international law. The national court's findings in all matters of national law would remain in effect; the international court would render opinions only on those specific questions involving international law. Presuming the integrity of the participants, enforcement of the judgments would follow the same procedure as enforcement of a judgment of the courts of last resort in the participating countries.

One might ask: Where is the good of an international judiciary on any level, when there is no international legislature with authority to enact laws as necessary in a dynamic world and no executive to administer them?

And a further, obvious question is: Would this sort of limited international court—manifestly a kind of regional arrangement—do more harm to the cause of world peace by its effective exclusion of the Soviet bloc than it did good by increasing understanding within its own limits?

As to the first question, the author emphasizes that there is a vital task open to such a court within the comparatively narrow scope suggested. That is the commencement of the ponderous project of lending order, force and dignity to the mass of international usages now existing. Considering the condition of this mass of usages and customs now—often lacking any authority whatever beyond the reputation of their authors—it is small wonder that the public has little understanding of, or respect for, international law. No international court exists with jurisdiction over these matters as they affect the individual. Mr. Ely proposes to fill that void wherever possible.

On the second point the author, we gather, would return an emphatic "no".

It is Mr. Ely's thesis that the habit of law-abidance

has grown with, and been fundamental in, the orderly growth of the community from family to tribe, town, region and nation. In each step, the codification, publication and public understanding of the customs evolved in the public welfare were integral with the development of the larger and more orderly community.

The final step in that evolution lies just ahead (if it is to be taken at all) the welding of the various nations into an orderly world community.

Just as it is incumbent upon the child to understand the rudiments of order on the family level, and the townsman to understand the rudiments of order on the town level, so it now becomes imperative for the citizen of the civilized world to understand the rudiments of order on the world level. The fact that some member nations of this *de facto* world community are reluctant to admit the necessity for an order except of their own peculiar invention does not diminish the need for the widest possible understanding of the rudiments of that order. In fact—to extend Mr. Ely's thinking one more step—the widespread existence of that truculence is one of the most powerful reasons for the greatest and swiftest possible extension of the understanding and respect for the elements of order among the people of those nations that subscribe to its need.

The burden of Mr. Ely's article is not, by our interpretation, a plea for pell-mell adoption of world government nor an angry reaction to the frustrations growing out of the Soviet bloc's intransigence in the United Nations. It is a closely reasoned proposal for the creation of an important instrument for promotion of greater international understanding, and through that understanding, of a more secure peace for the world.

Whether it is the precise, or even the approximate, instrument for the task remains to be determined. But at least it is a healthy and welcome departure from the futile, hand-wringing world of pious generalities.

Editorial **From a Member of Our ADVISORY BOARD**

■ *Worth the Cost*

Civil rights and its relation to proper and efficient crime detection and prosecution again was brought into prominence by the December 13 announcements of the Supreme Court. With great patience and meticulous fidelity the members of the Court attempted to adapt the facts of three situations to previously announced legal principles upon the protections of the Fourth Amendment. Upon the discretionary admission or exclusion of confessions obtained under duress of one kind or another, the Court had difficulty in reaching a common understanding. The explanation probably lies in the fact that the ground of this constitutional objection is constantly shifting.

The Court had given rather pointed warning to police officials and prosecutors who persisted in inching their inquisitorial methods just a little beyond the limits allowed under previous decisions, in the *McNabb* case in 1943. The opinions in these most recent cases again make clear a definite policy upon the part of the Court to support and enforce the constitutional protections of privacy and personal security even though the price in liberated criminals may be high. It is impossible to escape a certain amount of this cost. Principles of imperishable value to all the people in terms of personal dignity and security most frequently come up to the Court with crime detection and law enforcement agencies on one side, and criminal elements arrayed upon the other.

No matter what improvements may be invented or devised for the betterment of crime detection and law enforcement, the ingenuity of criminals will find ways to circumvent them for the achievement of their purposes. This is strikingly evident in the wire-tapping race between police and criminals. Interception of wire communications undoubtedly is playing a serious role in espionage and crime plotting. All of the most recent implements available to police experts in this field probably are known or soon become known to the underworld. It becomes more and more difficult to know what is permissible interception to obtain usable evidence, and what constitutes unwarranted interference with the communication devices of citizens. Obviously each case must be judged upon the merits of its own peculiar facts. In passing judgment upon results reached by the courts those who are prone to be impatient because the judicial escape of criminals is frequently involved will keep in mind two important considerations: (a) the Fourth Amendment marks a distinct line between free government and dictatorship; and (b) it expresses in concise terms the way of comfort and security in which we live, which is in such sharp contrast to the life of nervous fear lived by those in some of the other countries who must ever be prepared for raids and arrests for unexplained causes.

The release of a guilty criminal is unfortunate in any case, and an encouragement to anti-social elements everywhere. But the number of such instances is limited and will be fewer still as a greater awareness of and respect for the guaranties of the Constitution under our system of government shall grow among the police and prosecuting officials of the country.

JACOB M. LASHLY

St. Louis, Missouri

Each month a member of the Journal's Advisory Board is asked to contribute an editorial signed by him. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges and teachers of law, in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

Editor to Readers

The Commercial Law League of America announces an essay contest open to students of law schools approved by the American Bar Association. This approval must be in effect, in any given case, at the time of the filing of an entry blank by the prospective essayist. All essays submitted must cover one of these three subjects:

Mortgages on Inventory at Common Law and Under Factors' Lien Acts

Some Important Changes in Commercial Law Which Will Be Effected by the Adoption of the Proposed Commercial Code

The Present Situation in Regard to Financing Accounts Receivable in the Light of the Decision of *Corn Exchange National Bank and Trust Company* v. *Klauder* (318 U. S. 434)

Essays must be submitted on or before April 1, 1949, and must not exceed 3500 words in length, including quoted matter and citations. Those who wish to compete may obtain entry blanks from the editor of the Commercial Law Journal, 111 West Monroe Street, Chicago 3, Illinois.

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The New Orleans *States* recently published an editorial commending the Association for its attitude, evidenced by action of the House in Seattle last September, as to lawyers who refuse to answer whether or not they are Communists pursuant to questions propounded by congressional committees or other duly constituted authority. Our readers will remember this resolution of the House reported in 34 A.B.A.J. 899; October, 1948. For bringing the editorial to our attention we are indebted to Charles E. Dunbar, Jr., of New Orleans, a very alert and valued member of our Advisory Board. This is what the New Orleans paper said:

> Fellow-travellers, Communists and intolerant liberals have long cried out against questioning by congressional committees whether a witness was or was not a Communist.
>
> Their loud clamor has even had the effect of making some believe that such legally constituted committees have no right to ask such questions.
>
> What do the nation's lawyers think about all this?
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> According to the October issue of the American Bar Association Journal, the American Bar Association in its September meeting in Seattle adopted the following resolution:
>
> *"Resolved, That, in considering the matter of the expulsion of a member of the Association, the Board of Governors, when proceeding under Article II, Section 3 of the (ABA) Constitution, shall consider as impelling cause for such expulsion, the fact that any member has refused, on the ground of constitutional privilege, to state to any court, congressional committee or other duly constituted legal authority, whether or not he is or was a Communist."*
>
> The action of the American Bar Association speaks for itself on whether a congressional committee has the right to ask such questions, and on what the association thinks of members who fail to answer. In making their position clear, the association has done much to silence the Communist cry of "illegality."

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During 1949 there will be a series of Regional Traffic Court Judges and Prosecutors Conferences held under the sponsorship of the Association and the Traffic Institute of Northwestern University. The dates and places, two of them tentative, are as follows:

February	7-11	University of California School of Jurisprudence	Berkeley
May	23-28	Tulane University School of Law	New Orleans
June (Tentative)	6-10	New York University School of Law	New York
October (Tentative)	17-21	Northwestern University School of Law	Chicago

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The Columbus *Dispatch* pays tribute to Chief Justice Carl Weygandt of the Ohio Supreme Court for the "well chosen words" with which he administered the oath of office to newly elected members of that Court. In commending the Chief Justice for setting a fine example, the editors said:

> The well-chosen words of Ohio's Chief Justice Carl V. Weygandt on the occasion of swearing in the newly-elected judges of the State Supreme Court may well bear repeating, for they illuminate the vast responsibilities of all our courts, especially the highest one, and at the same time contribute pertinent thought to the best workings of government.
>
> Chief Justice Weygandt said:
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> "...every new member of this court soon discovers that sharing the solemn and challenging responsibility for saying the last word as to the law for the seven million people of this state brings more than honor—it imposes an inescapable obligation for the exercise of judicial temperament, undivided attention to duty, integrity unquestioned, ability of the highest and, finally, unflagging industry in the quiet, unspectacular and exacting labor of conscientiously studying the minute and elusive details of every case."
>
> The statement constitutes a precept and expresses for the judges what every American hopes the judiciary branch of the government and its members will stand for in the day-to-day discharge of their unglamorous but vital duties.
>
> Too often it is conceptions such as this that some of the more radical so-called liberals among us would break down. The independence, the integrity, of the judiciary is one of the main goals of those who would alter the form of government so as to bring all its force into the control of one or a few executive hands.
>
> Chief Justice Weygandt has restated the case for the judiciary and, properly, has placed a large part of the responsibility for maintaining its important position directly in the hands of individual judges who must live up to certain high ideals or suffer the whole idea to become weakened.

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It is gratifying to be able to cite in support of our editorial, "The *Journal* and the Profession", (34 A.B.A.J., 1026; November, 1948) similar sentiments from so eminent a leader as Henry L. Stimson. In the introduc-

tion to his book, *On Active Service in Peace and War,* appear these passages:

> The firm of which I was a member had a wide and varied practice. Mr. [Elihu] Root being a prominent advocate and trial lawyer, my attention had been drawn in that direction when I acted as his assistant in cases of importance. Even after he left us, my interest in the art and duties of advocacy still remained. . . . Through many channels I came to learn and understand the noble history of the profession of the law. I came to realize that without a bar trained in the traditions of courage and loyalty our constitutional theories of individual liberty would cease to be a living reality. I learned of the experience of those many countries possessing constitutions and bills of rights similar to our own, whose citizens had nevertheless lost their liberties because they did not possess a bar with sufficient courage and independence to establish those rights by a brave assertion of the writs of habeas corpus and certiorari. So I came to feel that the American lawyer should regard himself as a potential officer of his government and a defender of its laws and constitution. I felt that if the time should ever come when this tradition had faded out and the members of the bar had become merely the servants of business, the future of our liberties would be gloomy indeed. I became familiar also with the less direct ways in which the practice of the law is conducive to good citizenship and the lawyer is a stabilizing force in the body politic. I came to realize how important was his trained recognition that there are always two sides to a question and his appreciation of the importance of a fair hearing in every controversy. I came to realize the importance played in a democracy by persuasion as distinguished from force or threats and to recognize the importance of the lawyer as a trained advocate of persuasion.

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An excellent supporting brief for the suggestion contained in our editorial in this issue, "Needed—a New Court", will be found in Judge Wilkin's scholarly book, *The Judicial Function and Industrial and International Disputes,* reviewed in 34 A.B.A.J. 1112; December, 1948.

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John W. Davis, Chairman of the Special Committee on Restoration of the Inns of Court, has announced that $51,260.80 has been contributed so far by members of the Bar. The Special Committee has completed solicitation in thirty-one states, and is forming committees for solicitation in seven of the remaining states. In ten states, plans are being made to form solicitation groups.

Chairman Davis thanked members of the profession who have sent contributions, and announced that the Committee is endeavoring to give every lawyer in the United States an opportunity to contribute. Donations should be made by check, payable to Lowell Wadmond, Treasurer, 14 Wall Street, New York, New York.

* * * * *

Michaelmas Term, the beginning of the legal year in England, opened October 12 with the ancient tradition of the Procession to the Courts by the judges and members of the Bar. The following account of this year's Procession is contained in a letter from E. A. Godson, Secretary of the General Council of the Bar, Lincoln's Inn, to Mitchell Dawson of the Chicago Bar.

Special religious services are held in Westminster Abbey and in Westminster Cathedral (for Roman Catholics) to ask Divine Blessing upon the legal year. The Judges and King's Counsel are present wearing their colorful, full-bottomed wigs, gowns and Court dress, while the junior barristers wear robes.

The choir and clerics in attendance head the procession followed by the Tipstaff; Lord Chancellor's Secretary in Court dress; the Mace-bearer with the Mace; the Purse-bearer; the Lord Chancellor in full robes and insignia; the Lord Chancellor's assistant secretaries; the Lord Chief Justice; distinguished visitors; Lords of Appeal in Ordinary (morning dress); Lords Justices of Appeal and Judges of the High Court; Law Officers; County Court Judges; Recorder of the City of London; King's Counsel; and junior barristers. Each proceeds singly except the barristers, who walk in pairs. The Lord Chancellor and Lords Justices of Appeal have train bearers.

After the service, the procession reforms, and if there is a Lord Chancellor's reception, it moves across to the House of Lords. If not, it returns to the nave of the Abbey, and the judges go in motor cars to the Royal Courts of Justice in the Strand, and proceed through the Central Hall and break up and return to their respective courts.

The Mace looks like gold (but is probably not), and is about six feet high. The Mace was originally a weapon of offence capable of breaking through armor. On the Bayeux tapestry of the Norman Conquest, Bishop Odo is wielding one, even though clerics were not then supposed to spill blood. Ceremonial maces began in the reign of Richard I (1189-1199) and were held by the Royal bodyguard to protect the King's person. In 1677 the Chancellor's mace was stolen by a burglar. It is not certain whether the original was recovered or not.

The Purse mentioned above is the container for the Great Seal. It is of velvet and damask embroidery, about twelve by nine inches in size.

The Woolsack is not present as it represents the Parliamentary and not the judicial office of the Lord Chancellor.

This Abbey ceremony does not extend back before 1897. The Procession to the Courts itself is much more ancient. There has been only one Lord Chancellor's reception since 1939 owing to the severity of the times.

THE PRESIDENT'S PAGE

FRANK E. HOLMAN

▪ It hardly seems possible that five months have passed since the 1948 Annual Meeting in Seattle and that definite arrangements are now under way for the 1949 Annual Meeting in St. Louis. At this near half-way point in the Association year it may be an appropriate time to speak briefly and informally about the President's journeyings and activities during the last five months.

When this issue of the JOURNAL comes to your desk, your President will have travelled in excess of 25,000 miles and will have visited and addressed state and local bar associations and other professional and service groups in nineteen states. This is called to your attention not by way of measuring the duties of the office in terms of miles travelled or bar associations visited, but merely to indicate that lawyers and other groups throughout the country have a definite interest in the American Bar Association and its work and are desirous of having the President come and discuss with them and before them not only national and international issues but professional and bar association problems. Often requests come for a speech on the history of the American Bar Association and on what it is currently doing by way of public service. In most instances lawyers desire to visit informally and wherever time permits your President has made a point of attending the business meetings of the various bar associations visited and remaining for one or more days in each particular city. As a result, since the Seattle meeting your President has spent a total of less than one month in his own office in Seattle. By the time the year is over, it is likely that the number of miles travelled will exceed 50,000 and the number of states visited will approximate thirty-nine or forty, and in the case of many of the larger states more than one city has been visited.

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While travelling about the country it has been necessary for the President to dispose of a considerable correspondence and to consider a variety of executive problems and on this account to keep in constant touch with the headquarters staff in Chicago. The correspondence and executive work could not be carried on with efficiency and continuity by a President who finds himself in various parts of the country without the splendid cooperation of the executive staff in Chicago who are constantly alert to the various problems which arise.

Apart from keeping speeches up to date and of adequate variety, the most difficult aspect of the President's duties arises in connection with the constant disposal of correspondence. The President's mail bag arrives practically every morning wherever he may be. Many letters and communications come from responsible persons and organizations, both lawyers and laymen. Most are complimentary of the Association and the work it is trying to do. Some, however, are critical. Some involve requests for action by the Association. Not infrequently letters are received from persons "in trouble" —some of these obviously from cranks, or what is of more concern, from persons who claim to have had unfortunate experiences with the law.

All this correspondence, even of the type last mentioned, requires careful consideration and in some instances diplomacy in disposing of the letters. Oftentimes matters may be referred to local bar associations or local lawyers, but for purposes of maintaining and trying to improve "good public relations" your President has thought that all communications should be answered by him or referred to some other appropriate source for answer.

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Naturally, in travelling about the country, and in receiving letters from people in all walks of life, one gains certain impressions about what people are thinking. Whatever the difference of opinion in political, social and economic matters, Americans in general are much concerned over the present trends in law and government. With one voice they are against communism and every other form of "ism" that tends to undermine American institutions. They are opposed to collectivism and paternalism, and assert an abiding belief in the free enterprise system. They are confused, however, by the public pronouncements and the language of salesmanship of political leaders who pay lip service to free enterprise, and then advocate and support additional measures of paternalism and collectivism. Whether one talks to a railway brakeman in Oklahoma (with whom, due to storm conditions, I had more than an hour's talk) or with businessmen in service clubs—they all seem anxious for a form of leadership in this country which, as the railway brakeman put it, "will keep the Government from telling a man what he's got to do". This is almost a paraphrase of what Woodrow Wilson once said, to wit: "The American

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does not want a group of experts sitting behind closed doors in Washington trying to play Providence to him".

* * *

In meeting members of the Bar in various states I have been particularly interested and pleased to find that the younger lawyers are taking more and more an active part in bar association matters and in public service. The attendance at state and local bar association meetings of lawyers under forty would, in my opinion, comprise about two-thirds of the total lawyers present. I believe that the Junior Bar Conference has had a great deal to do with this increased interest on the part of younger lawyers. They are the hope of the future, not only for the American Bar Association but for the country as a whole. They represent the true spirit of America. They face for their generation as great a challenge as that which faced the makers of our Constitution in the most critical period of our history. They can supply the leadership necessary to permit the people of this nation to recapture their old freedoms and prevent the economic philosophy of paternalism from taking us permanently into the political philosophy of statism. This is a great challenge.

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Department of Legislation

Harry W. Jones, Editor-in-Charge

Drafting of Proposed Legislation By Federal Executive Agencies

■ Considerably more than half of the public laws enacted during recent Congresses have concerned the organization and functioning of executive departments and agencies. Great professional and public attention has been attracted by the relatively few of these statutes which have had as their purpose the prohibition and correction of administrative action deemed unsound or excessive by Congress. Less note is usually taken, outside the House and Senate committee rooms, of the less dramatic but far more numerous legislative proposals which are offered to clarify executive powers or to provide the basis for new administrative procedures and sanctions.

Day-to-day enforcement experience is the principal source of lawmaking policy in matters of government regulation and administration. It follows that the policies embodied in most of this apparently routine legislation will originate not within Congress but within the departments and agencies affected. And it is standard practice for agency requests and recommendations to be sent up to Congress as fully drafted bills, accompanied by explanatory and supporting documents. Legislative drafting activities of the highest order of importance are carried on in the offices of departmental solicitors and general counsel.

The drafting of legislation by executive and administrative officers has been criticized on strict separation of powers grounds in every Congress since the first session of the First. Political history has a way of repeating itself, and there is a contemporary ring to the denunciations of administrative bill-drafting practice delivered in the House of Representatives by John Randolph of Roanoke during the Jefferson administration and by Richard Fletcher during the presidency of Andrew Jackson. To the extent that Congressional reception of executive-drafted bills has ever approached the "rubber stamping" stage, outright condemnation is certainly in order. But assuming proper safeguards, and a fair level of technical drafting competence on the part of the administrative legal officers assigned to legislative work, there are clear advantages in having executive agencies reduce their recommendations to definite bill form.

Administrative Drafting Reduces Congressional Burden

A committee of Congress is in the best possible situation for effective performance of its duties with respect to an important item of proposed legislation when the members of the committee have before them a reliable and carefully prepared first draft, representing the best judgment of the agency with experience and enforcement responsibility in the governmental area under consideration. A great saving is accomplished in the time and energy of the committee members and their technical assistants when analysis can be concentrated on the crucial provisions of an actual draft at hand, without the time-consuming preliminary work which must be done when a bill is being drawn up from scratch.

The requests for legislation which come to Congress from the executive agencies are certain to be better thought out if they have been formulated as actual draft proposals. Every lawyer who has served as a legislative draftsman for an administrative agency knows that the drafting process is a unique discipline for the clarification of ideas within the agency itself. Many notions of policy and expediency which sound convincing when first advanced at an agency staff meeting fail to stand up

to the rigorous examination inherent in the practical drafting process. Incompletely developed ideas as to generally desirable legislation are better cut off within the offices of departmental solicitors than forwarded as hazy recommendations to add to the burdens of busy Congressional committees.

The preparation of proposed legislative measures by officers of the administrative departments presents certain very real problems of law-making procedure. Perfect working cooperation rarely exists among the many agencies of the executive establishment, and the draft legislation formulated within one department frequently reflects an unawareness or a heedlessness of the possible effects of the proposed legislation on the activities and plans of other agencies. General consistency in the legislative recommendations originating within the executive branch can be secured only by the maintenance of effective machinery for inter-agency consultation and clearance prior to the submission of departmental proposals to Congress.

The inadequacies of the then-existing procedures for coordination of the legislative activities of federal administrative departments were pointed up forcefully in a monograph prepared by Edwin E. Witte in 1936 for the President's Committee on Administrative Management. Since 1936 the Bureau of the Budget has been given broader authority to review the legislative proposals of all executive agencies and now serves as the general agent of the President for the purposes of interdepartmental clearance. The development of the powers of the Bureau of the Budget in legislative matters is one of the most significant chapters in the history of the federal law-making process and will be the subject of a future column in this Department.

Drafting by Agencies Should Not Be Final Word

Theoretical objections aside, the drafting of legislative proposals within the executive departments is an acceptable and useful practice if—and the "if" is crucial—the draft submitted by the executive agency is treated by the Congressional committees as a basis for analysis and discussion and not as the final word on the legislative subject. Middleton Beaman, Legislative Counsel for the House of Representatives since 1919, has stated the essential point in characteristically pungent fashion:

> I think everybody agrees that what is to be desired is that when the legislation is enacted it express accurately, down to the last comma and word in it, the intention of Congress in passing it. . . . If it meets that test 100 percent, it makes no difference where it comes from, if it comes from Heaven, from an executive department, or is written in our office or some other place. (Hearings before Joint Committee on the Organization of Congress, 79th Congress, 1st Session, page 421. April 27, 1945.)

The practical issue, in the last analysis, concerns the ability of Congressional committees and their staff assistants to subject bills of executive department origin to searching, *de novo* examination.

Lawyers with limited experience in legislative matters are likely to underestimate greatly the knowledge and hard work which must go into the analysis and revision of a technical bill prepared and recommended by an administrative agency. Fortunately, continuity of service on the standing committees of the House and Senate makes it reasonably certain that at least two or three of the members of each committee will have a comprehensive grasp of the subjects within the committee's field of jurisdiction. After a few terms on a standing committee, a good Congressman becomes able to recognize a want of candor in an agency explanation and vigilant to detect the presence of "sleeper" clauses in innocent-appearing proposed statutory provisions.

The professional staff assistants provided for each standing committee of Congress by the Legislative Reorganization Act of 1946 will add greatly to the effectiveness of the committees in judging departmental proposals, particularly if the political spoils system is not permitted to interefere with the tenure of qualified committee technical personnel. As in the past, the able and energetic lawyers on the staff of the Office of the Legislative Counsel will give such executive-drafted proposals as come to them for estimate and reworking the critical and painstaking study which has characterized the work of that Office since its establishment in 1919. The drafting of bills within the executive agencies has become an established preliminary step in the federal law-making process. There is no occasion for undue concern about the practice so long as Congress possesses the determination and the staff facilities necessary for an adequate job of independent examination and revision of the statutory drafts which come from the departments.

15

Lawyers in the News

Acme

Carl A. HATCH

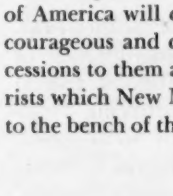
■ A lawyer-legislator who earned and has held the high respect and affection of many members of our Association who worked with him and came to know his marked capacity, courage and fidelity to high ideals, has been appointed to the United States District Court, in New Mexico, in the Tenth Circuit, in the person of Carl A. HATCH, who had resigned as United States Senator in order to accept the appointment. Few appointments to the federal bench have lately evoked such genuine pleasure and approval from leaders in our Association, who felt that he had earned and deserved the appointment, because they had seen at first hand the sterling character and worth of this thoroughly tested and qualified lawyer. He was quickly confirmed by the Senate.

HATCH was born in Kirwin, Kansas, in November, 1889. His degree in law was from Cumberland University. He began the practice of law in Eldorado, Oklahoma, in 1912, but removed in 1916 to Clovis, New Mexico, which has since been his home. During 1917 and 1918 he was Assistant Attorney General of his state, and in 1919 became the collector of internal revenue for that federal district.

In January of 1933 he was appointed the District Judge of the Ninth Judicial District of New Mexico; he was elected to the same office in 1924, for a six-year term. He served with an impressive aptitude as well as a flair for justice. In 1929 he resigned from the bench in order to practice law and engage in the politics of the Democratic party. He became the Chairman of its State Central Committee in 1930 and was a Democratic presidential elector for New Mexico in 1932. The following year he was appointed to the Senate of the United States to succeed Sam G. Bratton, who also had been a state court judge before he became Senator and left the Senate to become a United States circuit judge.

HATCH was elected in November of 1934 to fill out the unexpired term and was re-elected in 1936 and 1942 for full terms. Because assured of the appointment to the bench, he was not a candidate for re-election in 1948. In the Senate, HATCH manifested from the first open-mindedness and independence, as well as a grasp of the vital issues involved in legislation. On more than a few matters he showed courage and willingness to withstand partisan pressures. In our Association's fight against the "packing" of the Supreme Court in 1937, he was a tower of strength. In the difficult tasks of legislation to curb abuses on the part of administrative agencies, his parliamentary skill and his championship of our Association's objectives enabled him to render valiant assistance. He always formed freely his own independent impressions, as he should have done, as to the merits of our Association's proposals on many subjects before the Congress, and this course led him frequently to staunch and friendly support. At times he seemed to be "a thorn in the side" of the regular leadership and routined voting of his party, but awareness of his conscientious motives and reasoned judgment led to respect rather than rancor because of his independent course.

It is an interesting development in the large area and ten states constituting the Tenth Circuit that some of the ablest members of its judiciary have come from one of its less populous states. Chief Judge Orie L. Phillips and Judge Sam G. Bratton are from New Mexico; they have rendered distinguished service in the Court of Appeals and before they became members of it. The confirmation of New Mexico's gifted Senator as District judge is certain to add luster to a record already notable for conscientious and high-minded public service. The courts of America will continue to be both courageous and competent if the accessions to them are of the type of jurists which New Mexico has supplied to the bench of the Tenth Circuit.



Frank PACE, Jr.

■ The various changes dramatically made on January 8 in the personnel of our national government brought into the office of Director of the Budget Bureau a 36-year-old Arkansas lawyer who has been known to many members of our Association in his own right (he joined it in

1937) and has been especially cherished because of his esteemed father and mother. Frank Pace, Sr., of Little Rock, Arkansas, one-time law partner of the state's well known Governor and Senator, Jeff Davis, has been active in our Association in many posts for many years, and was a member of the old Executive Committee (predecessor of the Board of Governors) as far back as 1926. Flora Pace, who has since died, was equally beloved in our Association.

A keen observer of the Washington scene said the other day that the Truman regime is "a mountaineer administration". Many men from the mountain areas in states of the South, many of them young men, are in high places—men from western Virginia, Kentucky, southeastern Missouri and Arkansas (the Ozarks), eastern Tennessee, western North Carolina.

Young PACE has been marked in Washington as likely to "go places" on his personality and ability, ever since he came to Washington while serving with the Air Transport Command during the war. The lank son of the Ozarks had finished his school at 14, taken "prep" school in stride, won his college degree at Princeton, gained his law degree at Harvard in 1936 and served a stiff "internship" in his home state—a district attorney's office, the state revenue department and his father's law office. Then he spent four years in uniform, coming out with the rank of major in 1946.

In Princeton, young Frank had not gained his growth—was puny and by no means rugged. He had the coordination for sports and tried hard, but he could not make a first team and finally settled for golf, where he could not get his score dependably below the low seventies. In Washington during the past two years, he has won the National Press Club golf championship twice in a row, and was given an Oscar last year for his low score in the Washington *Post's* National Celebrities Tournament.

When he came to Washington to enter the government service, he was first a special assistant in the Attorney General's office; he made friends and a favorable impression too fast to stay there long. The young Arkansan soon was executive assistant to Postmaster General Hannegan, and in January of 1948 became Assistant Director of the Budget Bureau under the fast-moving Jim Webb. Up to that time his specialties were golf and people—he showed an amazing capacity for widespread acquaintance—but his specialties have largely gone by the board as he tried to learn the multitudinous details of Uncle Sam's fast mounting budget. He still manages to keep close acquaintance with several very influential men in high place from the Ozarks, which are in Arkansas—and in Missouri. Just at present President Truman's budget is a man's-size job, but the hard-working son of Frank Pace, Sr., seems to be making the grade right well on his own.

Conway Studios

Bruce BROMLEY

■ To fill the vacancy in the New York Court of Appeals caused by the resignation of Judge Thomas D. Thacher because of ill health, Governor Thomas E. Dewey consulted the leaders and judiciary committees of the state and local bar associations and with their expressed approbation selected "a leading trial lawyer with the widest experience in all Courts of this state and the Supreme Court", a nationally-known lawyer who has been an active partner in several of the leading law firms of the metropolis. Mason H. Bigelow president of the state bar association, declared Mr. BROMLEY to be "the best possible selection for this office". The qualifications of more than fifty lawyers were carefully considered before the selection was made. Although the chairmen and members of the judiciary committees endorsed him regardless of their usual political affiliations, there has been no assurance given that the Democratic party will join in bestowing on Judge BROMLEY the bipartisan election which is deemed to be called for by his talents for the office and by the present Democratic preponderance in the membership of the Court.

BROMLEY was born in Pontiac, Michigan, in 1893. His ancestors had come from England to Michigan via Vermont. His mother's family came from Holland and settled in Flatbush (now a part of Brooklyn) about 1647. He was graduated from the University of Michigan and the Harvard Law School, was an ensign and lieutenant (j.g.) in the Navy in World War I, and received his law degree in 1917. He was at first associated with the law firm of Winthrop and Stimson, and then went to Brooklyn to become a partner of Stephen C. Baldwin, a great trial lawyer to whose daughter he was married in 1922. They live in Willow Street, Brooklyn, and Mrs. Bromley has been a member of the Municipal Civil Service Commission since 1942. Politically, BROMLEY is a Republican but has never held or been a candidate for public office. He became a member of our Association in 1932.

He has been since 1926 a member of the firm of Cravath, Swaine and Moore. He has appeared in the courts in many conspicuous cases, particularly as to the law of libel. He represented *Esquire* in the proceeding in which the Supreme Court reversed and set aside the order revoking its second-class mailing privileges because of the "Varga girl" drawings. Recently he has appeared before the FCC for the American Broadcasting Company in defending its "give-away" radio programs attacked as lotteries.

The selection of BROMLEY for New York's great Court came in no sense as a reward for partisan or political

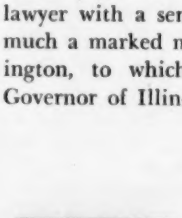
activity. His continuance by unopposed election would remove the Court further from the vicissitudes of politics.

Adlai Ewing
STEVENSON

■ Forty-nine years ago this month there was born in Los Angeles a grandson of Adlai Stevenson, who had been the Vice President during the second term of Grover Cleveland as President of the United States. Early in January of this year, the grandson took the oath of office as Governor of Illinois, after having been elected as a Democrat by the largest majority ever recorded in the history of the state and having done this in an election in which he had been given, at the time of nomination, no chance to do more than win a creditable vote. In a state in which the accusation that he was a "striped-pants internationalist" was deemed certain to be fatal to his chances, he boldly asserted that he is internationally-minded but confessed that his "striped-pants" are full of moth-holes and he has not worn them since his wedding.

STEVENSON has had an unusually satisfying American career, in which still larger rewards may loom ahead for him. He was graduated from Princeton in 1922 and from Northwestern in law (J.D.) in 1926. He has edited a newspaper in Bloomington, Illinois, practiced law successfully with one of Chicago's foremost law firms (Cutting, Moore and Sidley, and its successors), served as an apprentice seaman in World War I and as an assistant to Secretary Knox during World War II, and does a lot of the actual work on his seventy-one acre farm at Libertyville, Illinois. He was a State Department adviser at the San Francisco Conference, a member of the Preparatory Commission which set up the United Nations organization, and an alternate delegate to its General Assembly. In those capacities his work appeared to be solid rather than sensational; he did not catch headlines, but got things done. He has served his country on various post-war missions, and has taken an increasing interest in the affairs of his adopted state, where he has been identified with Hull House, the state and local bar associations, and many good causes. He became a member of our Association in 1930.

Now he wants to re-write the Illinois Constitution, increase its social services, and put the state's administration on a basis of merit and efficiency. His astounding power to win friends and votes has made this lawyer with a sense of humor very much a marked man now in Washington, to which he returned as Governor of Illinois in January.



Ernest A.
GROSS

■ The Department of State announced December 29 that Ernest A. GROSS, legal adviser to the Department, has been selected as Co-Ordinator for Foreign Assistance Programs in the office of the Under Secretary of State.

The selection was made following a Presidential directive that "all related aspects of foreign economic and military programs" be worked out on a comprehensive and integrated basis. During the 80th Congress, members of the national legislature frequently complained that they could not give intelligent consideration to the European recovery program, for instance, without knowing what other commitments in military and economic aid abroad were planned. It will be Mr. GROSS' task in his new office to collect the details of the various programs recommended by the Administration and weave them into a single pattern so that members of the 81st Congress will not make the same complaint.

According to the State Department announcement, Mr. GROSS will be in charge of coordinating the Department's activities in the foreign assistance field, including planning for and initiating legislation affecting foreign military and economic assistance, and its presentation to Congress. He will represent the Department in discussions with other agencies of the Government concerning United States policy in this field. He will be directly responsible for getting together the Korean program, the Greek-Turkish arms program, the Philippine and Latin-American arms programs, and continuation of military aid to China, if such aid is to be continued. The appointment of Mr. GROSS does not change the authority of the Economic Co-Operation Administration nor the duties of Charles Bohlen, who handles the Department's liaison with Congress.

Mr. GROSS studied law at Harvard, and became an assistant legal adviser to the Department of State in 1931. He has held positions with the National Association of Manufacturers, the National Labor Relations Board and the National Graphic Arts Commission. Before becoming legal adviser to the Department in August, 1947, he was a special assistant to the Assistant Secretary of State for Occupied Areas.

Readers of the JOURNAL will recall Mr. GROSS' article on the European recovery program which appeared at page 1103 of the December, 1948, issue.

Review of Recent Supreme Court Decisions

CONSTITUTIONAL LAW

Civil Rights — Convictions Reversed Where Evidence Was Obtained upon Defendant's Arrest in His Apartment after Entry Through Landlady's Apartment Without Warrant

■ *McDonald* v. *United States,* 335 U. S. 451, 93 L. ed. Adv. Ops. 144, 69 S. Ct. 191, 17 U. S. Law Week 4045. (No. 36, decided December 13, 1948.)

Petitioners McDonald and Washington were convicted of carrying on a lottery upon evidence obtained when police officers, after entering a rooming house through the landlady's quarters without a warrant, saw them engaged in the "numbers game" in McDonald's apartment and arrested them. The Court of Appeals affirmed by a divided vote.

The convictions were reversed by the Supreme Court. Mr. Justice DOUGLAS spoke for the Court, holding that McDonald's motion for suppressing of the evidence and its return should have been granted. He was also of opinion that the denial of the motion was error to Washington. He rejects the argument that the search violated only the landlady's rights under the Fourth Amendment, and not those of McDonald, saying that this case involved no compelling reasons which would justify absence of a search warrant.

Mr. Justice RUTLEDGE concurred in the Court's opinion as to McDonald, and in the result as to Washington, saying that the evidence, having been illegally obtained, was inadmissible as to him.

Mr. Justice JACKSON, joined by Mr. Justice FRANKFURTER, concurred in the Court's opinion, but supplemented it with a separate opinion which declared that each tenant of a building has a personal and constitutionally protected interest in the security of the whole building against unlawful search, and remarks that the police officers, by breaking and entering, had committed an offense more serious than the one of which McDonald was convicted.

Mr. Justice BLACK concurred in the result.

Mr. Justice BURTON, with whom the CHIEF JUSTICE and Mr. Justice REED concurred, dissented, saying that the petitioners had no right to object to the presence of the police in the rooming house, and that the actual observance by the police of the commission of a crime justified immediate arrest and seizure of evidence which was in plain sight.

Y.

The case was argued by John Lewis Smith, Jr., and Charles E. Ford for McDonald and Washington, and by Frederick Bernays Wiener for the United States.

CONSTITUTIONAL LAW

Due Process—Conviction upon Plea of Guilty Entered by Youthful Prisoner without Being Advised of His Right to Counsel or of the Consequences of His Plea Violates Due Process

■ *Uveges* v. *Pennsylvania,* 335 U. S. 437, 93 L. ed. Adv. Ops. 152, 69 S. Ct. 184, 17 U. S. Law Week 4049. (No. 75, decided December 13, 1948.)

Uveges, a youth of 17, was convicted in Pennsylvania on four counts charging burglary. He pleaded guilty, allegedly under threats made by the assistant district attorney and without being informed of his right to counsel.

Reversing the conviction on the ground that this violated the due process clause of the Fourteenth Amendment, Mr. Justice REED said that some members of the Court feel that the Constitution guarantees the services of counsel in every case where serious offenses are charged, while other members feel that when the crime charged is not capital each case depends upon its own facts. Here, he continues, either rule would require reversal since Uveges was inexperienced in the intricacies of criminal procedure, and the court made no effort to make him understand the consequences of his plea. "Only a waiver of counsel, understandingly made, justifies trial without counsel," he concludes.

Mr. Justice FRANKFURTER, joined by Mr. Justice JACKSON and Mr. Justice BURTON, dissented on the ground that the only question before the Court was the propriety of the action of the Supreme Court of Pennsylvania in refusing Uveges' petition for allowance of appeal from the lower state court, and that this was denied because the constitutional question was improperly presented to the Pennsylvania high court. Therefore, he says, Uveges should be left to pursue his remedy in Pennsylvania.

Y.

The case was argued by Albert A. Fiok for Uveges, and by William S. Rahauser and Craig T. Stockdale for Pennsylvania.

CONSTITUTIONAL LAW

Michigan Statute Permitting the Licensing of Woman as Bartender only Where Father or Husband Owns Establishment Does Not Deny Equal Protection of Laws

■ *Goesaert* v. *Cleary,* 335 U. S. 464, 93 L. ed. Adv. Ops. 187, 68 S. Ct. 198, 17 U. S. Law Week 4077. (No. 49, decided December 20, 1948.)

A Michigan statute provides that bartenders in cities over 50,000 must be licensed and that no female may be so licensed unless she is the "wife or daughter of the male owner" of a licensed liquor establishment. A three-judge federal district court refused to enjoin enforcement of the statute on a claim that it violated

Reviews in this issue by Richard B. Allen and Rowland L. Young.

the equal protection of the laws clause of the Fourteenth Amendment.

In an opinion by Mr. Justice FRANKFURTER, the Supreme Court affirmed, saying, "Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind the legislation was an unchivalrous desire of male bartenders to try to monopolize their calling."

Mr. Justice RUTLEDGE wrote a dissenting opinion in which Mr. Justice DOUGLAS and Mr. Justice MURPHY concurred. He stated that the statute "arbitrarily discriminates" since a male liquor establishment owner may employ his wife or daughter, while a female owner could not be licensed as a bartender herself or employ her daughter.

A.

The case was argued by Anne R. Davidow for Goesaert, and by Edmund E. Shepherd for Cleary.

CRIMES

Conviction Based on Confession Obtained from Prisoner While Being Held Illegally Before Arraignment Cannot Stand Despite Verdict That It Was Voluntary

■ *Upshaw* v. *United States*, 335 U. S. 410, 93 L. ed. Adv. Ops. 129, 69 S. Ct. 170, 17 U. S. Law Week 4053. (No. 98, decided December 13, 1948.)

Upshaw was convicted in a federal court upon a confession obtained while he was being held on suspicion for thirty hours before arraignment. At the trial, he objected to admission of the confession, alleging that it was obtained illegally under Rule 5(a) of the Federal Rules of Criminal Procedure (which requires arraignment "without unnecessary delay") and the holding in *McNabb* v. *United States*, 318 U. S. 332 (1943), which held that confessions were inadmissible where they were the plain result of holding and interrogating persons without carrying them "forthwith" before a committing magistrate as the law commands.

The trial court thought that the delay in Upshaw's case was not unreasonable under the circumstances. The Court of Appeals, injecting a confession of error, affirmed the conviction on the ground that the *McNabb* case merely extended the meaning of "involuntary" confessions to include psychological coercion as well as physical.

Mr. Justice BLACK, speaking for a majority of the Court, reversed. He restates the rule of the *McNabb* case as "a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological . . .,' " and says that the facts here come within the rule. Upshaw was held without arraignment, he points out, because the arresting officer realized that there was not enough evidence for the court to hold him until a confession had been obtained. The opinion expressly states that this ruling is not based on constitutional grounds. *United States* v. *Mitchell*, 322 U. S. 65 (1944), is distinguished on the ground that the detention had not yet begun to be illegal when the confession was made.

Mr. Justice REED, with whom the CHIEF JUSTICE, Mr. Justice JACKSON and Mr. Justice BURTON joined, dissented. The minority feel that the *McNabb* ruling was not intended as a penalty for unlawful acts of police officers, and that the majority decision is an unwise extension of the *McNabb* doctrine. They believe that the true holding of the *McNabb* case was that confessions obtained by psychological pressure before arraignment are inadmissible and they believe that the Court should affirm upon the jury's verdict that the confession was voluntary.

Y.

The case was argued by Joel D. Blackwell for Upshaw, and by Robert S. Erdahl for the United States.

EVIDENCE

Prosecution May Ask Defendant's Character Witnesses as to Information of Arrest of Defendant on Dissimilar Charges Twenty-Seven Years Ago

■ *Michelson* v. *United States*, 335 U. S. 469; 93 L. ed. Adv. Ops. 160; 69 S. Ct. 213; 17 U. S. Law Week 4068. (No. 23, decided December 20, 1948.)

Michelson was convicted of bribing a federal revenue agent. He admitted passing the money, but claimed that it was done in response to the agent's threats and inducements which amounted to entrapment. The issue turned on whether the jury should believe the agent or the accused.

At the trial in 1947, Michelson produced witnesses who testified that he enjoyed a good reputation in the community. In cross examining these witnesses, the prosecution put the question, "Did you ever hear that on October 11, 1920, the defendant, Solomon Michelson, was arrested for receiving stolen goods?" The trial judge admitted this question after ascertaining out of presence of the jury that it was *bona fide*. The defendant argued that this was reversible error. The Court of Appeals ruled that the question was proper.

Mr. Justice JACKSON delivered the Court's opinion affirming the conviction. After a review of the common law rules of evidence as to character witnesses, he says that inquiry as to an arrest is proper because arrest may cloud a reputation and because the question tests the witnesses' qualification to bespeak community opinion. "If one never heard the speculations and rumors in which even one's friends indulge upon his arrest, the jury may doubt whether he is capable of giving any very reliable conclusions as to his reputation." The Court rejected a suggestion that it adopt the Illinois rule which allows inquiry about arrest only for charges closely similar to those in the indictment in the case at issue, pointing out that here the defendant had sought to establish a character which included "honesty and truthfulness" and "being a law-abiding citizen".

Mr. Justice FRANKFURTER concurred in the Court's opinion and rendered a brief separate one, stating that it was unwise for an appellate court to formulate rigid rules with respect to excluding in courts evidence that outside them would not be regarded as clearly irrelevant.

Mr. Justice RUTLEDGE, joined by Mr. Justice MURPHY, dissented on the grounds that to permit the question was indirectly to tell the jury that he had been arrested in 1920, something which it could not be told directly and which defendant had had no opportunity to deny, and that even if inquiry as to clearly derogatory acts were to be permitted, mere arrest was not a proper subject of inquiry. Y.

The case was argued by Louis J. Castellano for Michelson, and by Joseph M. Howard for the United States.

JURY

Conviction by a District of Columbia Federal District Court Jury Composed Entirely of Government Employees Not a Denial of Trial "by an Impartial Jury"

■ *Frazier* v. *United States*, 335 U. S. 497, 93 L. ed. Adv. Ops. 175, 68 S. Ct. 201, 17 U. S. Law Week 4061. (No. 44, decided December 20, 1948.)

Petitioner was convicted in the United States District Court for the District of Columbia of violation of the Harrison Narcotics Act. The jury was composed entirely of federal government employees. The juror Moore and the wife of juror Root were employed by the Treasury Department, whose responsibility it is to enforce the Act. During selection of the jury petitioner's counsel moved to strike the entire panel, stating that when the veniremen were assembled those not wishing to serve were asked to step aside and that this left mostly federal employees and housewives and unemployed available for jury duty. After petitioner had exhausted his peremptory challenges (none of them being used against government employees) and the jury had been selected, he challenged the twelve government employees finally constituting the jury for cause. All petitioner's motions were denied. Petitioner appealed on the basis of the Sixth Amendment's guarantee of trial "by an impartial jury" and then for the first time referred to jurors Moore and Root but the Court of Appeals for the District of Columbia affirmed.

The Supreme Court, with Mr. Justice RUTLEDGE delivering the opinion, affirmed, holding (1) that counsel's statement relating to the request that certain prospective jurors step aside was insufficient without proof, and that even if supported by proof, would be insufficient to support counsel's conclusions; (2) that since petitioner had chosen to eliminate those privately employed and retain those employed by the Government, and since government employees are not excluded by virtue of that status alone from serving on juries, petitioner's challenge to the entire panel was without merit; and (3) that in regard to Moore and Root there was not enough connection with the Narcotics Bureau to provide ground for the court's rejection of them for "actual bias" on its own motion, nor could the court on its own motion have given effect to their inclusion as support for the challenge to the jury as a whole.

Dissenting, Mr. Justice JACKSON, joined by Mr. Justice FRANKFURTER, Mr. Justice DOUGLAS and Mr. Justice MURPHY, stated that regardless of its effect on the present case, a system within the federal courts which produces what disinterested persons are likely to regard as a packed jury should be ended by the exercise of the supervisory power that the Supreme Court possesses over the federal judiciary and that the conviction should be reversed. A.

The case was argued by M. Edward Buckley, Jr., for Frazier and Robert W. Ginnane for the United States.

17

Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE

Army and Navy . . . Federal Tort Claims Act . . . statute, by requiring U. S. Army to render medical services to families of personnel "whenever practicable" makes duty "discretionary" and Government is therefore not liable for breach.

■ *Denny* v. *U.S.*, C. A. 5th, December 17, 1948, McCord, C. J.

A commissioned Army officer and his wife sued under the Federal Tort Claims Act to recover damages for defendant's alleged negligence in failing to furnish prompt ambulance service and medical attendance to plaintiff wife during childbirth, resulting in the stillbirth of the child. The trial court granted defendant's motion to dismiss the complaint and denied plaintiff's motion for a new trial on a proposed amended complaint. The Court acted on the ground that defendant was under no duty imposed by law to provide plaintiffs with the medical services requested, but that it was merely a discretionary function and that recovery was therefore precluded by the express words of the Federal Tort Claims Act. Title 10, §96, USC, provides: ". . . The medical officers of the Army and contract surgeons shall *whenever practicable* attend the families of the officers and soldiers free of charge." Army Regulation No. 40-505 provides: "Under the conditions indicated herein the Army usually through its own facilities will provide medical attendance to the personnel enumerated . . . below . . . *Whenever practicable,* the wife, dependent children, and servants of persons enumerated . . . above".

The appellate Court affirmed the judgment, and held that under the phrase "whenever practicable", appearing in both the statute and regulation, the government's obligation to provide medical services to Army dependents was merely discretionary in character; hence, there could be no actionable damage since the government was not liable under the Federal Tort Claims Act for failure to perform, or for improper performance of, such a discretionary function, "whether or not the discretion involved be abused." (28 USC §943 [a]).

Sibley, C. J., concurring, considered the dismissal proper since the stillbirth, which was the only injury alleged in either the original or the proposed pleading, was not actionable in Texas. He maintained, however, that the duty of Army medical officers to attend the families of Army personnel was conditioned on the "fact of practicableness", rather than upon the exercise of discretion, so that the exception in the Federal Tort Claims Act was inapplicable.

Army and Navy . . . Manual for Courts-Martial, U.S. Army, 1949, made applicable to the Department of the Air Force.

■ Code of Federal Regulations, Tit. 3, Executive Order 10026 (14 Fed. Reg. 85).

As prescribed by Executive Order 10026, the *Manual for Courts-Martial, U. S. Army, 1949* [35 A.B.A.J. 62; January, 1949], is made applicable to the Department of the Air Force for the government of personnel within its jurisdiction, in accordance with the provisions of a preface adapting the *Manual* for use in the Air Force. Both the *Manual* and the preface are to be in effect in the Department on and after February 1, 1949, and are to apply until midnight July 26, 1949, to all court-martial processes taken with respect to Army personnel under the command and authority of the Chief of Staff, United States Air Force. The preface, which is also set forth in the *Federal Register* of January 7, 1949, contains the definitions, interpretations, adaptations and additions which are to be used to construe and implement the language used in the Articles of War and in the *Manual,* when applied to the Air Force, with numerous helpful illustrative examples.

Bills, Notes and Checks . . . statute of limitations . . . for purposes of computing period of limitations indorsee's claim on check drawn by United States accrues on date of indorsement.

■ *Reliance Motors, Inc.* v. *U. S.*, U.S. Ct. Cls., December 6, 1948, Littleton, J. (Digested in 17 U.S. Law Week 2276, December 21, 1948).

Plaintiff, a Philippine corporation, sued to collect upon a check for $4,300 dated December 30, 1941, claim for which had been filed with the Treasury Department in 1945 but had not been acted upon by the Department prior to suit. Thereafter, on April 16, 1948, intervenor, also a Philippine corporation, filed its petition in the suit, alleging ownership of the claim by virtue of indorsement and delivery of the check for the full value thereof.

Plaintiff's complaint alleged that the check was given by United States Army officials, in Manila, in payment for requisitioned automobiles; that plaintiff's officers were unable, due to the proximity of Japanese invading forces, to deposit the check in a bank; and that two of plaintiff's officers, acting after termination of their authority and while interned in a Japanese prison camp, in June, 1942, indorsed the

check and exchanged it through underground channels at a 30 per cent discount. The intervenor's petition alleged acquisition of the check in June, 1942, inability to present it for payment at that time, and appropriation or destruction of the check by the Japanese forces in December, 1944. Plaintiff moved to dismiss the intervening petition on the grounds that intervenor's claim accrued December 31, 1941, and was therefore barred by the six-year statute of limitations prior to filing of the petition to intervene. The motion was denied.

The Court observed that, where two persons assert ownership of a claim against the United States, the period of limitation is not necessarily the same for both parties; this result was said to flow from the general rule that "a claim accrues . . . when all the events have occurred which fix the liability of the United States to a claimant and which entitle such person to sue thereon." Accordingly, since "the intervenor could not have presented the check or made claim thereon prior to June 1942," the period had not expired at the time the intervening petition was filed on April 18, 1948.

Madden and Whitaker, JJ., concurring in the result, maintained that the period of limitations was the same for an indorsee as for the payee; were the rule otherwise, a check could be kept alive indefinitely by judicious indorsement. The concurring judges assumed, however, that "the statute did not begin to run until a reasonable time had elapsed after delivery to give the payee an opportunity to present the check for payment." Accordingly, it being "very unlikely" that an opportunity to present the check for payment occurred more than six years prior to April 16, 1948, denial of the motion was proper pending the taking of evidence on the point.

Civil Aeronautics Administration . . . order prohibiting racial segregation at Washington National Airport.

■ Code of Federal Regulations, Tit. 14, Ch. II, Pt. 570 (13 Fed. Reg. 8736).

In the *Federal Register* of December 30, 1948, the Civil Aeronautics Administration, acting pursuant to its authority under the Act to Provide for the Administration of Washington National Airport (54 Stat. 686-688), amended Code Fed. Reg., Tit. 14, Ch. II, Pt. 570 by adding a new §570.28. The new regulation requires that in the operation of all facilities of the Washington National Airport, services shall be rendered without discrimination or segregation as to race, color or creed. The amendment became effective immediately.

Civil Aeronautics Administration . . . Assimilative Crimes Act . . . order prohibiting racial segregation at Washington National Airport held valid despite Virginia segregation statutes.

■ *Air Terminal Services, Inc.* v. *Rentzel*, U.S.D.C., E.D.Va., January 3, 1948, Bryan, J.

In an action for an injunction to prevent enforcement of the order by the Administrator of the Civil Aeronautics Administration prohibiting the maintenance of racial segregation at the Washington National Airport, Bryan, J., denied the injunction and upheld the order as a valid federal regulation taking precedence over the segregation laws of Virginia. He said that the exclusiveness of the federal jurisdiction over the airport could not be questioned. Plaintiff, however, had urged that the order violated the federal Assimilative Crimes Statute (18 USC, § 13, made applicable to the Airport by P. L. 208, § 106), which makes a federal crime any act or omission on a federal reservation which would be punishable under the laws of the state in which the reservation is situated; Virginia segregation statutes were thus said to have been adopted by the federal criminal statute.

Rejecting plaintiff's contentions, the Court points out that the Assimilative Crimes Act was intended "to use local statutes to fill in gaps in the Federal Criminal Code", but that it is not to be allowed "to override other 'federal policies as expressed by Acts of Congress' or by valid administrative orders", and that "one of those 'federal policies' has been the avoidance of race distinction in Federal matters" of which the Administrator's regulation is but an additional effectuation.

Contracts . . . restraint of trade . . . declaratory judgments . . . promisor in covenant not to engage in business may maintain action for declaratory judgment as to covenant's legality.

■ *Beit* et al. v. *Beit*, Conn. Supreme Ct. Err., December 14, 1948, Maltbie, Ch. J. (Digested in 17 U. S. Law Week 2295, January 4, 1949.)

Plaintiff vendors of an interest in three retail grocery stores covenanted in the bills of sale that they would not during the next thirty years engage in the meat and grocery business in the county in which the stores were located. Subsequently plaintiffs, desirous of engaging in such business in the county, brought an action for a declaratory judgment that the covenant was unreasonable and unenforceable. Judgment by the trial court declaring the covenant illegal was appealed by defendant.

Sustaining the judgment for plaintiffs, Maltbie, Ch. J., with whom two other judges concurred, held the action for a declaratory judgment a proper remedy since the covenant constituted a restraint of trade against public policy, and since the restriction would impose an undue hardship upon plaintiffs. In support of his position that a declaratory judgment was available to a promisor in such a covenant, he stated that "if the fact that a promisor has received a valuable consideration does not preclude him from defending against the enforcement of a contract because it is against public policy, or from seeking affirmative relief against it by way of cancellation or the like, we cannot see why that fact should preclude him from seeking a declaratory judgment to determine whether or not it is an enforceable agreement." The case for a declaratory judgment under such circumstances was said to be stronger than one for affirmative relief, since the promisor in seeking

such a judgment implies a willingness to abide by the covenant if found legal and, if it is found unenforceable, public policy is thereby maintained.

Brown, J., with whom one judge concurred, dissenting, maintained that to aid plaintiffs by way of a declaratory judgment was to afford them effective affirmative relief which, as a matter of policy, would encourage fraud and dishonesty in business dealings. Furthermore, such a judgment was said to contravene the doctrine of *in pari delicto*, hitherto applied by the Court in denying aid to the parties to an illegal contract.

Copyrights . . . mechanical reproduction . . . Buenos Aires Convention and proclamation publishing it do not amount to proclamation of reciprocal protection required by Copyright Act for creation of rights of foreign composer against reproduction in United States.

■ *Todamerica Musica, Ltda.* v. *Radio Corporation of America*, C. A. 2d, December 6, 1948, A. N. Hand, C. J.

Plaintiff, a Brazilian corporation, sued various American corporations for alleged infringement of plaintiff's rights to the mechanical reproduction of a Brazilian musical composition. Judgment dismissing the complaint was sustained on appeal.

The Court maintained that § 1 (e) of the United States Copyright Act was insufficient to give protection to the Brazilian composer and his assignees against mechanical reproduction in the United States. The Court interpreted § 1 (e), which confers mechanical reproduction rights, as subject to the provision of § 8 (renumbered as § 9 in 61 Stat. 652, 1947) that foreign composers receive copyright protection only after presidential proclamation that their country extends "substantially equal" protection to American composers. [In so interpreting the Act, the Court approved 29 Op. Atty. Gen. 64 and the opinion of Coxe, J., in *Portuondo* v. *Columbia Phonograph Company*, 36 P. Q. 104, (S. D. N. Y., 1937).] Neither the Buenos Aires Convention of 1910, applicable to Brazil, nor the presidential proclamation making it public, 38 Stat. 1785, 1826, were deemed to encompass mechanical reproduction rights, within the doctrine of *White-Smith Music Company* v. *Apollo Company*, 209 U. S. 1, which held that broad terminology in an earlier Copyright Act did not include such rights. In support of this conclusion, the Court pointed out that subsequent presidential proclamations have generally made specific reference, by way of inclusion or exclusion, to mechanical reproduction rights, and that attempts were made (at Havana in 1928 and at Washington in 1946) to amend the Buenos Aires Convention so as to include such rights.

Federal Power Act . . . § 23(b) . . . alleged pre-1920 federal authority for maintenance of hydroelectric developments in navigable waters and on public lands held inadequate in specific instances.

■ *In re Montana Power Co.*, Doc. No. IT–5840, FPC Opin. No. 170, November 30, 1948.

In this proceeding, the Federal Power Commission held that licenses under the Federal Power Act (16 USC §791a *et seq.*) were required for the continued operation and maintenance by the Montana Power Company of seven hydroelectric developments on the Missouri River and two on the Madison River.

The Commission, after finding the Missouri River navigable in the area concerned so as to require the licensing of four of the developments which were operated without federal authority, rejected the company's argument that it needed no licenses for an additional three of the Missouri River developments because they were maintained under valid federal authority granted prior to June 10, 1920, within the terms of an exception expressed in §23 of the Act. The Commission found an "admittedly valid" permit for the company's Holter development, issued by the Secretaries of Agriculture and of the Interior, to be inadequate because it authorized occupancy of public lands, but not of navigable waters. Authority was similarly held to be lacking for the Hauser development because statutory authorization for occupancy of the river had expired by its terms. It was also held that permits for occupancy of public lands, issued in 1907 by the Secretaries of Agriculture and of the Interior, were not available to the Montana Power Company since the conditions permitting transfer from the original permittee to the company had not been fulfilled in a series of parent-subsidiary mergers and corporate reorganizations, the last of which took place in 1912. The Commission maintained that there was "no inconsistency between piercing the corporate veil . . . in accounting cases and the adherence to the corporate entity theory in testing the validity of an alleged transfer". Nor was the company's position improved, in the Commission's eyes, by the fact that the permit-issuing Departments had demanded and had been paid rentals and fees under the unassigned permits. "Such payments," said the Commission, "are no more than compensation for the use of public lands by a trespasser." The company's Canyon Ferry development was held lacking in authority since it involved the flooding of public lands without permit. The Commission deemed it unnecessary to determine whether the Canyon Ferry project was authorized by the Rivers and Harbors Act of 1896, since that Act, being "an exercise of commerce authority", could at most have authorized no more than maintenance of the dam in a navigable water as distinguished from the flooding of lands.

The Commission held, without determining the navigability of the Madison River, that both developments on that river occupied public lands without valid federal authority.

Habeas Corpus . . . parole . . . issuance of Parole Violator Warrant does

not give rise to conclusive presumption that issuer possessed "reliable information" of parole violation required by statute.

■ *Campagna* v. *Hiatt*, U.S.D.C., N.D. Ga., December 4, 1948, Underwood, J. (Digested in 17 U.S. Law Week 2284, December 28, 1948).

While on parole petitioners were arrested upon Parole Violator Warrants and were returned to federal prison. On subsequent habeas corpus proceedings, petitioners alleged and introduced evidence to prove that the Parole Board member who issued the warrants did not have "reliable information", as required by statute, that petitioners had violated their paroles. The Board refused to indicate in any way whether its members possessed such information, and stood on the proposition that the question was not open to judicial review, since issuance of the warrants gave rise to a conclusive presumption of the possession of the required information.

The Court, in directing discharge pursuant to writs of habeas corpus, maintained that the requirement of reliable information was "in the nature of a jurisdictional requirement," and that the Board's wide discretion did not extend to arbitrary and capricious reimprisonment of parolees. Existence of "a presumption of the legality of the warrants" was noted, but the Court deemed the presumption rebuttable and overcome on the record in the instant cases. Accordingly, the warrants were held to be illegal.

The Court observed, however, that such illegal warrants could be corrected at any time by issuance of warrants based on reliable information of parole violation; stay of execution of the judgments for discharge of the prisoners was ordered for fifteen days, to allow time for issuance of legal warrants or for appeal by the Board.

Insurance . . . scope of coverage . . . where change of speed and direction contributed to injuries sustained while jumping from car to escape improper advances of insured they were within scope of automobile liability insurance covering accident arising from maintenance and use of car.

■ *Columbia Casualty Co.* v. *Abel*, C. A. 10th, December 1, 1948. Bratton, C. J.

Plaintiff insurer was obligated, under a policy of automobile liability insurance carried by defendant Abel, to defend any suits and pay (within the limits of the policy) any judgments against Abel for damages caused by accident and arising out of the ownership, maintenance or use of the automobile. Defendant Ellington, seeking to escape improper advances made to her by Abel while she was riding with him, attempted to jump out of the car, whereupon Abel increased his speed and swerved the car to the left. She fell, was injured and subsequently brought suit against Abel in an Oklahoma state court. Plaintiff thereafter instituted action against Abel and Ellington for a declaratory judgment that the policy did not cover the situation. Judgment for defendants was affirmed.

The Court reasoned that Ellington's injuries were the result of accident, since she intended to land on her feet and did not anticipate the change in speed and direction of the car, and that the accident occurred as a result of the operation and use of the car by Abel, since his change of direction and speed was negligence under the circumstances. Though Ellington's actions (assault and battery being expressly excluded) may have been a contributing cause of the injuries, they were not the exclusive cause and hence the insurer was not relieved from defending the suit against Abel and paying any judgment awarded.

For the same reasons, the Court affirmed a judgment awarded Ellington on her counterclaim for medical expenses, under a clause of the policy obligating the insurer to pay reasonable medical expenses of any person injured as a result of accident arising from the use of the car.

Securities and Exchange Commission . . . adoption of amendments to the general rules and regulations under the Securities Exchange Act of 1934 governing registration and reporting . . . intended to integrate into rules requirements heretofore contained in forms.

■ Code of Federal Regulations, Tit. 17, Ch. II, Pt. 240, (13 Fed. Reg. 9321).

In the *Federal Register* of December 31, 1948, the SEC announced the adoption of amendments to those portions of the General Rules and Regulations under the Securities Exchange Act of 1934 dealing with the registration of securities on national securities exchanges and the filing of annual and other reports pursuant to the Act. These amendments are effective January 17, 1949. *Inter alia*, Rules X-12B-1 to X-12B-10, inclusive, X-12D1-1, X-13A-1 to X-13A-10, inclusive, X-13B-1 and X-15D-1 to X-15D-6, inclusive, were rescinded and supplanted by Regulations X-12B, X12D1, X-13A, X13B-1 and X-15D. The revision integrates into the general rules and regulations certain general requirements, heretofore contained in the several forms, with respect to the preparation, content and filing of applications for registration and annual and other reports.

The newly-adopted rules cover the following matters: applications and reports, certification by exchanges, reports of issuers of listed securities and reports of registrants under the Securities Act of 1933.

The Commission made a formal finding that the action involved no substantive change in the rights or duties of any person and that prior notice need not be published under § 4(a) of the Administrative Procedure Act.

Shipping . . . conflict of laws . . . nonresident alien seaman suing for tortious injury aboard vessel of Panamanian ownership and registry and for maintenance and cure must prove law of Panama permits recovery.

■ *Sonnesen* v. *Panama Transport*

Company, N. Y. Ct. App., November 24, 1948. Desmond, J.

Plaintiff, a Danish seaman, contracted tuberculosis while at sea on a ship of Panamanian registry, owned and operated by defendant Panamanian corporation. There was evidence that plaintiff's illness was aggravated by insistence of the ship's officers that he keep at work after he first became ill. Alleging failure to provide prompt and proper medical attention, plaintiff sued for damages under the Jones Act (46 U.S.C. § 688), and, in a separate count, for maintenance and cure. Judgment for plaintiff on both counts was reversed and dismissal ordered by the Appellate Division on the ground that, as to the first count, there had been no breach of duty under the Jones Act, if applicable, nor under the general maritime law of Panama which would be assumed to be the same as ours, while, as to the second count, plaintiff was getting all of the maintenance and cure to which he was entitled. On further appeal, a new trial was ordered.

The Court held that neither the statutory nor decisional law of the United States applied where a non-resident alien seaman sued a non-American shipowner and alleged tortious treatment on a non-American ship on the high seas. The facts that plaintiff signed the articles in New York and was to be discharged in a United States port after a voyage in "world-wide trade" were regarded as insufficient elements to bring American law into operation. Since there had been no showing as to the law of Panama, and the Court did not deem it appropriate to assume the maritime law of Panama (a civil law country) to be the same as that of the United States, or to take judicial notice of Panamanian law under the New York Civil Practice Act, § 344-a, a new trial was ordered as to both counts.

Specific Performance . . . "unique chattel" . . . contract for sale of new car held subject to specific performance.

■ *Berryhill* v. *Whitehead & Lloyd*, Miss. Co. Ct., 1st Jud. Dis., December 2, 1948, Manship, J.

The Court in this action ordered specific performance of a contract between complainant and defendant automobile agency for the purchase of a new Ford car. Complainant made a deposit of $25 and received a receipt stating that the car was "to be delivered as soon as possible." The evidence indicated that from January, 1947, to October, 1948, defendant had sold and delivered cars to purchasers who had no previous orders. Defendant claimed that it had a right to deliver its cars to whomsoever it desired, regardless of the agreement with complainant.

The Court found that there was a valid and specific contract for the purchase of the car binding on both parties, and that defendant was bound to deliver the car under the contract within a reasonable time which had since elapsed. The Court was of the opinion that complainant did not have an adequate and full remedy at law for the breach of the contract, since he was unable to purchase a new car "in the open market", and since defendant had the sole and exclusive agency for Ford cars in the city. Accordingly, defendant was ordered to specifically carry out its contract by delivering a new car to complainant within a period of sixty days. (The order has been appealed to the Chancery Court).

United States . . . Federal Tort Claims Act . . . recovery by subrogee held prohibited by Anti-Assignment Act.

■ *U.S.* v. *Hill*, C. A. 5th, December 17, 1948, Sibley, C. J.

All of three persons injured in a collision with a negligently-operated Army truck recovered judgment in the trial court for the amount of their damages less the amounts previously recovered from an insurer; the insurer, as subrogee, recovered a judgment for the amounts paid under the insurance policy. On the Government's appeal from denial of a motion to dismiss the insurer's claim, the judgments were reversed with instructions to enter judgment for the three injured persons for the full amount of their damages.

The Court agreed with the insurer's argument that the Federal Tort Claims Act, standing alone, did not prohibit recovery of a judgment against the United States by a subrogee. It held, however, that judgment in favor of a subrogee was barred by the Anti-Assignment Act, 31 USC § 203.

Hutcheson, C. J., dissenting, expressed the view that the majority had engaged in "formal shadow boxing" and had ordered a reversal because "the judgment in one play awarded the money directly to the persons entitled to it instead of by double play from the United States to Mrs. Hill . . . and from Mrs. Hill to" the insurer. He also pointed out that the result was in conflict with the view of every circuit court of appeals which had considered the question (citing *Aetna Casualty & Surety Co.* v. *U.S.*, C. A. 2d, November 4, 1948 [34 A.B.A.J. 418, May, 1948; 35 A.B.A.J. 65, January, 1949], *Employer's Fire Insurance Co.* v. *U.S.*, C. A. 9th, 167 F. (2d) 655, *Old Colony Insurance Co.* v. *U. S.*, C. A. 6th, and with the concession of the Government in *Yorkshire Insurance Co.* v. *U. S.*, C. A. 3d, November 5, 1948.

THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

Recent Books on International Law and Government

After each war we have witnessed rapid growth in the sphere of application of international law and in the machinery for its administration and enforcement. Some people are apt to complain that the tempo of this development is too slow, and that international law and institutions are in consequence too weak to cope with the grave problems of our times. It might even be said that the lessons of each war lead humanity to the acceptance of new rules which might have prevented that war if they had been in force prior to its outbreak, but that these rules are not strong enough to prevent the *next* war. Others are more hopeful and believe that there is a chance that a war may still be averted if we just utilize every opportunity for progress offered to us by the Charter of the United Nations. We not only need new institutions, but we should utilize to the **full** the institutions which now exist.

That we are not standing still is evidenced by several of the new books published in 1947 and 1948. Most of them are new editions of books previously published. Even a casual comparison between the old and the new editions shows clearly not only a better grasp of the subject on the part of the authors, but also their realization that in the interim period great changes have been accomplished and that greater progress has been made than was anticipated when the previous editions were published.

While it is impossible to deal here with all the books on the subject that have been published in recent years, the following books deserve to be brought to the attention of our readers.

INTERNATIONAL LAW: *Volume I, Peace. By L. Oppenheim. Sixth Edition by H. Lauterpacht. London, New York and Toronto: Longmans, Green and Company. 1947. $25.00. Pages 940.*

This classic British treatise has become one of the main tools of the practitioners in the field of international law. Its concise, clear and careful statements of existing rules cannot be easily rivaled. Professor Lauterpacht, who also edited the very popular fifth edition of this treatise, has remained true to the spirit of the great author, despite many revisions and additions. Only where new situations have arisen, has the editor ventured on his own (for instance, in the sections on the United Nations, the trusteeship questions and the rights of man). In the sections devoted to recognition, one can notice the results of the editor's recent monographic studies on that subject, and there is a considerable departure from the original text. The editor has also brought up to date the excellent bibliographies which accompany almost every section of the book.

INTERNATIONAL LAW. *By Charles G. Fenwick. Third Edition. New York and London: Appleton, Century and Crofts, Inc. 1948. $5.00. Pages 744.*

This textbook, first published in 1924, is a favorite of teachers of international law, especially in colleges. It is written in much clearer language than most books on the subject, and is considerably less expensive than the monumental treatise by Professor Hyde. The first 200 pages are devoted to a general introduction, including a chapter on the United Nations. Some 140 pages deal with the laws of warfare, and there are less than thirty pages on the pacific settlement of disputes. The author's experience in inter-American relations is evidenced by numerous examples drawn from Latin American and inter-American practice. He is a steadfast proponent of a dynamic law of nations, "fixed enough to assure the continuity of rights and duties," but "elastic enough to meet the changing conditions of international life and intercourse"; a balance must be sought between "stability and justice".

A MANUAL OF INTERNATIONAL LAW. *By George Schwarzenberger. Stevens & Sons Limited. 1947. $9.00. Pages 428.*

The first part of this compact volume contains a succinct statement of the rules of international law, condensed from the author's larger treatise (reviewed in 32 A. B. A. J. 591; September, 1946). The second part includes a comprehensive study outline of problems of international law and organizations. The author presents a large selection of problems for discussion, together with a list of cases, documents, articles and books, in which an answer may be found. He has collected a great mass of material from sources hitherto neglected, and has thus provided an extremely useful guide for teachers of the subject. The book seems to be, however, too difficult for students or novices to use, and can be recommended only for advanced seminars and experts.

AN INTRODUCTION TO THE STUDY OF INTERNATIONAL

ORGANIZATION. *By Pitman B. Potter. Fifth Edition. New York and London: Appleton-Century and Crofts, Inc. 1948. $4.50. Pages 479.*

Less than 300 pages of this volume are devoted to exposition; the remainder comprises an illustrative collection of documents garnered from the records of international conferences and of the United Nations. The Covenant of the League of Nations is conspicuously absent. The author shows the evolution of general international organization towards an international federation, which may be achieved gradually "by the voluntary cooperation of the states in the paths of conference, administration, and arbitration". It is a thoughtful volume, often philosophical in approach. While it is confined to general problems, it explores them more thoroughly than other books on the subject.

INTERNATIONAL GOVERNMENT. *By Clyde Eagleton. Revised Edition. New York: The Ronald Press Company. 1948. $5.00. Pages 554.*

This book is much richer in detail than Professor Potter's book which is reviewed above. A large proportion of it is devoted, however, to international law, and only 300 pages deal with international government. The League of Nations and the United Nations are carefully analyzed, but in many cases the author confines himself to the written instruments, without an exploration of their application in actual practice. The author discusses the various proposals for world government and believes that "they move in the right direction"; he thinks, however, that the American people are not yet prepared for the strengthening of the United Nations, even in cases where this can be accomplished without a revision of the Charter. This book should prove of great value not only to teachers, but also to laymen interested in acquiring a basic knowledge of the subject, in particular as it is written in a lucid style, with a minimum of technical double-talk.

BRITISH NATIONALITY LAW AND PRACTICE. *By J. Mervyn Jones. London, New York and Toronto: Oxford University Press (Oxford: At the Clarendon Press). 1947. $8.50. Pages 452.*

This book presents an admirable clarification of the complicated British nationality problems. It contains not only a commentary on the British law on the subject, but also a much-needed exposition of the law and practice of British dominions and colonies. A large appendix contains the texts of all relevant statutes; some of them have been changed, however, since the publication of this volume.

LEGAL EFFECTS OF WAR. *By Arnold Duncan McNair. Third Edition. Cambridge: At the University Press. 1948. $6.00 Pages 458.*

Each war leaves in its wake a tangle of legal problems. After the World War I, lawyers found a guide to their solution in the first edition of the volume under review. To many of them, the purchase of this volume proved to be a gold mine. Though the author deals mainly with the British law on the subject, American lawyers are often confronted with similar problems, and this book throws new light on several questions which have arisen under analogous provisions of American law.

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW. *1946. London, New York and Toronto: Oxford University Press. $12.00. Pages 535.*

The new volume of this Year Book contains a series of extremely good articles on various aspects of international law. The editor, Professor Lauterpacht, provides in "The Grotian Tradition in International Law" a revaluation of the contribution of the father of international law on the tercentenary of his death. Professor Brierly deals with "The Covenant and the Charter," while "Pollux" criticizes the present approach to "The Interpretation of the Charter of the United Nations". Professor Wortley evaluates "The Veto and the Security Provisions of the Charter". There is an article on "Some Legal Problems of UNRRA" by the Assistant General Counsel of that organization, A. H. Robertson. A problem in conflict of laws is discussed by M. E. Bathurst in "Recognition of American Divorce and Nullity Decrees". Also of interest to American lawyers is F. A. Vallat's note on "The Continental Shelf". Besides numerous other notes and book reviews, there is a section on English decisions and a new feature —a long, well annotated section on constitutions of international organizations.

Association Calendar

APRIL 8—Deadline for Receipt in the Chicago Headquarters of Petitions for Nomination of State Delegates. (For publication in the April JOURNAL, petitions must be received by March 10.)

APRIL 20—Mailing of Ballots for Voting for State Delegates

MAY 15—Meeting of the Board of Governors, Washington, D. C.

SEPTEMBER 5-9, 1949—72nd Annual Meeting of the Association, St. Louis, Missouri

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Likes Editorial on *McCollum* Case

■ I wish to congratulate you upon the admirable editorial entitled, "Undefined and Shifting Lines of Decision", in the November, 1948, issue of the AMERICAN BAR ASSOCIATION JOURNAL.

I note that you close with the words of Lord Chancellor Eldon: "It is better the law should be certain, than that every judge should speculate upon improvements in it." Never at any time has this been more true than at the present moment, and I was much interested in the incisive and lucid fashion with which your editorial called attention to the disregard of this rule in our present highest tribunal. It is not merely the painful situation in which the lawyers are left by reason of this growing uncertainty and chaos in our fundamental law, since they find it impossible to advise clients with any sureness, but that so many important concerns of daily life of the citizen are affected. As you so well put it:

> Difficulties have come when the Court appears not to have proceeded with care and experimental caution and exploration, but has transmuted long-established and well-regarded boundaries into "undefined and shifting lines".

You adduce a few apposite illustrations of this present very pronounced trend or policy on the part of the Court to determine cases by their own "considerations of wisdom and expediency". This very marked tendency has been demonstrated by the scholarly and detailed articles of Mr. Ben Palmer printed in our JOURNAL, and to which you refer. You stress particularly the recent *McCollum* case as to the so-called "released time" for religious instruction for the children in public schools. The holding that such a method of instruction conflicts with the First Amendment of the Constitution "that Congress shall make no law respecting an establishment of religion" seems to illustrate your view that personal considerations of what is wise or expedient were controlling in the minds of the judges regardless of the teachings of American history, the decisions of state courts and the desires and customs of local communities throughout the country.

With the general policy of the First Amendment no American can quarrel; that the practice of religion by an individual should be subject only to the dictates of conscience and that no church of any sect or denomination should be established by the state is a fundamental precept of our constitutional law.

Released time is certainly not a law respecting the establishment of religion, but is rather a law recognizing the complete disestablishment of any religion.

In this country, however, there has never been any widespread hostility to religion, and to the general belief in the ultra-mundane forces making for good, and ultimately ruling the universe. It has been the belief of many generations of Americans that religion and morality went hand-in-hand, the former furnishing the sanction for the latter.

The teaching in schools, or elsewhere, of ethics wholly disconnected from religious belief or sanction has been conspicuously unsuccessful. The struggles in so many European countries, and especially in France, along these lines well illustrate this fact. We must assume that President Washington was quite as familiar with the Constitution and the fundaments of American policy as could be any judge of the Supreme Court. It is difficult to think that he would have sympathized with the decision in this case of "released time"—so illustrative of the fact that much of our recent constitutional law has merely formulated the predilections or prejudices of individual justices rather than historic and national policies and opinions. As Mr. Justice Jackson frankly says in his concurring opinion:

> It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions. *McCollum* v. *Board of Education*, 333 U. S. 237, 238 (1948).

In perhaps the most solemn and influential of the addresses of George Washington, the Farewell Address, he sums up the matter in such masterly fashion that I cannot refrain from quoting his words:

> Of all the dispositions and habits which lead to political prosperity religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens. The mere politician, equally

with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with public and private felicity. Let it simply be asked, where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice. And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

The First Amendment was designed to prevent the Congress from establishing any religious creed or church as a national organization and to maintain the right of all persons to worship in their own way, or not at all, as they wished. This is the perfectly plain interpretation of the meaning of the Amendment. It was intended to operate upon Congress, and not upon the states, to which full latitude was left in the matter.

The Court, in recent years, has held that the Fourteenth Amendment made this First Amendment equally applicable to the states. Whether they predicate this upon a distinction between natural and other types of rights is a philosophic question which I do not seek to determine. But in any event, the Amendment prescribed governmental neutrality among differing creeds rather than hostility to all religions, which is a very different thing. As Mr. Justice Reed in his dissenting opinion very truly says:

> The prohibition of enactments respecting the establishment of religion do not bar every friendly gesture between church and state. (*McCollum* v. *Board of Education*, 333 U. S. 255, 256 (1948).

Were it otherwise, the daily opening of our Congress with prayer, the existence of chaplains in the Army, and many other instances indicating American understanding of the Amendment would long since have been prohibited. The policy of the American people has never been that of a boycott of religion by the federal or state governments. The relationship between religion and morality has always been recognized in our public life. The recent view of the Supreme Court appears to be that of the laicization of morality. This policy, which is so well known and which has caused so much strife in some nations, is not found in our Constitution, nor is it consistent with American history and practice.

It does seem unfortunate that the Supreme Court has felt it necessary to adopt this view, which seems to savor much more of the policy of certain radical elements derived from doctrines of eighteenth-century writers and leaders of the French Revolution than from American history and principles.

Had the majority of our Supreme Court been so historically-minded as were their predecessors, who determined the case of *Ponce* v. *The Roman Catholic Church*, 210 U. S., 296, I cannot but think that the Court would have held that there was nothing shocking to American principles of constitutional law in allowing children, whose parents belonged to various religious denominations or organizations, to receive that instruction in religion which George Washington emphasized as being so fundamentally connected with a sense of right and duty.

It seems to me unfortunate that the Court should have adopted the extreme anti-church and anti-religious view to reach a result which, as you wisely say was "not written into the First Amendment, and should not have been read into it". I trust that it may not be the tendency of the Court, which occupies so pivotal a position in our constitutional structure, to insist upon exercising clearly legislative and constitutional amendatory functions in pursuance of the theories or prepossessions of individual judges.

FREDERIC R. COUDERT
New York City

Disagrees with President Holman

■ I find myself in such strong disagreement with the underlying theory of President Holman in one branch of his argument in opposition to the International Bill of Rights, that I am constrained to send you my thoughts on the subject (with a copy to him). My reference is to his discussion of the "very serious constitutional and legal questions" involved, beginning at the bottom of page 1122 of the December, 1948, JOURNAL.

I am one of those who believe that world peace cannot be achieved and maintained unless and until an international organization is created having the power to enact, interpret and enforce laws that are binding upon all the member nations, under a voting plan that is reasonably designed to reflect the real opinion of the world. This is not to say that the field in which this power exists should be a wide one. On the contrary, the most intelligent use must be made of the world's experience in selecting and defining the sphere of activity of a world government. We must not create a jurisdiction under a broad power, only to find it extended by interpretation into domestic corners in which it was never intended to operate. We must not repeat the experience of our own country in creating a power to "regulate interstate commerce", intended to remedy an existing evil of a clearly interstate nature, only to have the power extended by interpretation until it reaches into almost every corner of the domestic activities of the states, to an extent never imagined by the draftsmen of the Constitution. But when a subject has once been recognized as truly one for international control, and the power of control has been clearly and carefully delimited, the power over it ought to be conferred upon the international government; it ought not to be left to each individual nation to decide whether or not it chose to abide by the opinion of the majority. An example would be the control of the conduct of war, if wars must occur. Another example would be the enforcement of treaties, once solemnly made.

Mr. Holman's basic argument destroys all hope of achieving such an

objective. He gives a counsel of despair.

We can test Mr. Holman's argument by assuming (contrary to fact, of course) that power to adopt an International Bill of Rights has been conferred upon an international legislature, under a constitution to which the United States has subscribed by constitutional processes. The Constitution and laws of the United States would then drop out of consideration, for their effect would have been eliminated by the constitutional submission to the new authority. The United States would be bound to abide by the Bill, "without their having any voice about it, either by their own votes or through the votes of their duly elected representatives,"—although our duly *chosen* representatives would have had their word. This would indeed be a "far-reaching and revolutionary change in the processes of our constitutional government", but it would not be a "dangerous" one or an undesirable one so long as the original delegation of power had been carefully, thoughtfully and far-sightedly made. It would be no less far-reaching and revolutionary, and no more dangerous, than the creation of our own government in 1787, or, indeed, any different from it in principle.

Mr. Holman's argument is instinct with the idea that our country will never be willing to submit to the will of the majority, even within meticulously selected areas for international action, without retaining a power to decide isolatedly for itself and without testing the international action by its conformity to our existing ideas. Surely, Mr. Holman cannot have attended meeting after meeting of the American Bar Association, associating and exchanging ideas with lawyers from forty-eight jurisdictions, and still believe that the things that are done and believed in the community where he lives are the only ones that are right? And, expanding the limits of the field, can he believe that the things that are done and believed in the United States are the only ones that are right? He must know that the ideas of the states of Washington, of New York, of Louisiana and all the rest, are often as poles apart; yet each had the wisdom and foresight to yield a portion of its own power in order that a more far-reaching and unprejudiced power might operate for the common good in fields in which the common interest was the same. If the central power is properly created, there need be no fear of the "fundamental rights and liberties of the citizens of this country" being "declared and substantially affected" without justification and reasons. If the rest of the world, acting within the delegated powers, thinks a certain course is right, we cannot take pride in asserting that we alone are the judges of what is proper. On the contrary, I should take more pride in my country if it were to take the lead in creating a means of obtaining an "authoritative interpretation" of the United Nations Charter or of any other instrument into which it may develop, to which we would bow, whether or not we thought the decision well-founded. We as lawyers are well-trained to submission to the decision of a court, however wrong we may consider it. We have not been afraid to advocate unreserved submission to the International Court of Justice.

I do not wish to be understood as differing with Mr. Holman in his opposition to the International Bill of Rights on other grounds. I think only that one of the substantial bases of his opposition is itself inconsistent with a proper basis for international cooperation and is subversive of any hope for eradicating isolationism.

CHARLES M. LYMAN

New Haven, Connecticut

President Holman's Reply to Mr. Lyman

■ It seems to me that Mr. Lyman has erected a "straw man" and then proceeded to demolish it, and in the process attempted to use this technique as an occasion for arguing the cause of "limited" World Government. There was nothing in what I said in the December JOURNAL regarding the International Bill of Rights program that could fairly be construed as arguing either for or against eventual World Government —either limited or otherwise. Mr. Lyman's "straw man" consists *inter alia* of basing his argument upon assumptions which he recognizes as contrary to fact. Since to date no power of legislation with respect to an International Bill of Rights or other matter directly affecting the rights of the citizens of member states has been conferred upon the United Nations Assembly, it does constitute a by-passing of our constitutional processes for the General Assembly, by its exclusive legislative fiat, to legislate as to basic rights affecting the life, liberty and property of our citizens. To use Mr. Lyman's own language—until a subject has been "recognized as truly one of international control" and I may add, so recognized by and through the exercise of our constitutional processes, as for example by ratification in the form of a treaty as the Charter itself was ratified, it is valid to point out as I did that the exercise of unconferred legislative powers by the General Assembly (whether with respect to an International Bill of Rights or otherwise) raises serious constitutional and legal problems and involves a dangerous by-passing of our constitutional processes.

FRANK E. HOLMAN

Seattle, Washington

Clarifies Powers of Massachusetts High Court

■ In the review of the book, *The Legacy of Sacco and Vanzetti*, appearing on pages 1106 and 1107 of the December, 1948, JOURNAL the reviewer makes the statement, apparently by way of quotation from the book, that in 1910 the "judicial system [of Massachusetts] had been changed to provide one judge of the Superior Court and limitation of appellate review to 'a matter of law apparent upon the record' ".

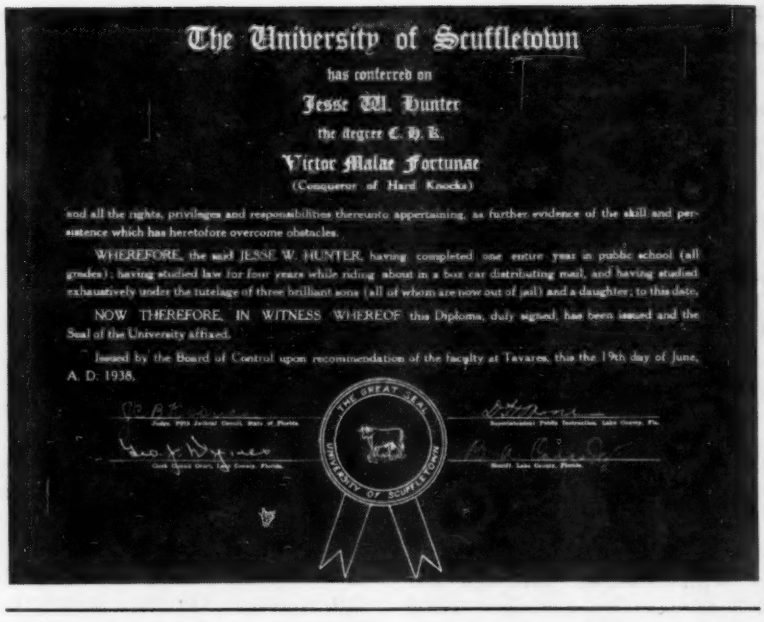
Acts of 1910, Chapter 555, Section 3, did change the law affecting trials of capital cases in Massachusetts by reducing the number of presiding justices at the trial from two or more justices to one. Otherwise the judicial system was not changed in the slightest degree. The powers of the Supreme Judicial Court, the court of last review in Massachusetts, were neither increased nor decreased by the 1910 statute.

This is made plain by the opinion of the Supreme Judicial Court in the case of *Commonwealth* v. *Phelps*, 210 Mass. 78 (1911), where the alleged crime was committed prior to the enactment of the act in question. "The question in the case is whether a statute enacted after the commission of an offense is void as an *ex post facto* law because its effect is to provide that one in place of two or more judges shall preside" (page 79). "In the case at bar there was no change in the indictment that had to be found nor in the conduct of the trial by which the fact of the defendant's guilt had to be established, nor in his right to have any and all questions of law reviewed by the same appellate court that was in existence when the alleged crime was committed. The only change was in the fact that one in place of two or more judges was to and did preside at the trial" (page 82). For that reason the Supreme Judicial Court determined that the law was not void as an *ex post facto* law so far as this defendant was concerned.

JAMES M. ROSENTHAL
Pittsfield, Massachusetts

Unusual Degree Held by Florida Lawyer

■ The other day I happened to be at Tavares, Florida, a lovely county-seat town in the lake and hill country of Florida. I went into the office of Jesse W. Hunter, who is now and has been for many years State Attorney of the Fifth Judicial Circuit of Florida and one of the leading lawyers in that section. Alongside the diplomas of his sons hanging in the reception room of his office, I found the enclosed diploma and asked for and obtained


The University of Scuffletown
has conferred on
Jesse W. Hunter
the degree C. H. K.
Victor Malae Fortunae
(Conqueror of Hard Knocks)

and all the rights, privileges and responsibilities thereunto appertaining, as further evidence of the skill and persistence which has heretofore overcome obstacles.

WHEREFORE, the said JESSE W. HUNTER, having completed one entire year in public school (all grades); having studied law for four years while riding about in a box car distributing mail, and having studied exhaustively under the tutelage of three brilliant sons (all of whom are now out of jail) and a daughter; to this date,

NOW THEREFORE, IN WITNESS WHEREOF this Diploma, duly signed, has been issued and the Seal of the University affixed.

Issued by the Board of Control upon recommendation of the faculty at Tavares, this the 19th day of June, A. D. 1938.

THE GREAT SEAL
UNIVERSITY OF SCUFFLETOWN

a photostatic copy.

Upon investigation, I was informed that Mr. Hunter's sons, who are ably following in his footsteps, did not wish to hang their diplomas, law and otherwise, without providing a diploma for their illustrious father. The result was this diploma from the University of Scuffletown duly granted by the late Judge J. C. B. Koonce, Circuit Judge, George J. Dykes, Clerk of the Circuit Court of Lake County, Florida, for many years, and by the Superintendent of Public Instruction and the sheriff of that county.

Scuffletown is cracker language for shanty town, or hard scrabble, and interpreted means the school of bitter experience.

MORRIS E. WHITE
Tampa, Florida

Disagrees with Colonel King

■ I spent nearly five years in the Regular Army of the United States, enlisting therein as a recruit in 1916 at the age of 17 years. During this service I held various ranks, being appointed a regimental sergeant-major in 1918. One of my duties required the handling of records of court-martial proceedings and my knowledge of these proceedings would not make very agreeable reading for the average American citizen. Following my separation from the service in 1920, I was commissioned in the Officers' Reserve Corps as an adjutant general, which commission I held until I was appointed to the bench. My only experience with court-martial procedure under the so-called reforms following World War I demonstrated that they had very little efficacy because these matters, for the most part, were left in the hands of the military commander. I was counsel for an accused enlisted man and the whole affair was farcical.

I am a former Chairman of the Section on National Defense of the Commonwealth Club of California, a former Judge of the Superior Court of California, and organized the Selective Service System for the City and County of San Francisco in 1940.

I am intensely interested in the reform of military justice. Probably, it would be more accurate to say "creation or establishment of military justice".

I have read with interest Colonel King's defense of the present court-martial procedure, which appeared in the December, 1948, issue of the JOURNAL. His point of view I can understand because I once held such view myself. It is the view of the military mind at its worst or best,

depending upon the side one takes. Colonel King's view overlooks entirely that giant imponderable created by the thralldom of rank, discipline and special privilege, which renders it next to impossible for the average enlisted man to know and intelligently exercise the few rights that are accorded him when he is accused of violation of military law. It is this imponderable that is the real road-block lying athwart the road leading to military justice. This thing is substantive rather than procedural.

Giving full credit to Colonel King's honesty and sincerity of opinion—and I do so credit him—nevertheless his criticism of the JOURNAL's August editorial on military justice is a model of special pleading. In essence, it is a case of the thing being bad but, yet, it could be worse. Wherever the letter of the law favors the accused, he stresses that letter—although he well knows that in actual practice these statutory requirements often receive cavalier treatment as is the very nature of a dictatorial institution such as a military organization—yet, when he deals with the letter of the law unfavorable to the accused, he attempts to explain it away by saying that the military commander delegates such authority to his subordinates. What a defense! No military commander is qualified to police his own conduct and conscience. No human being is qualified to do this and least of all one who is steeped in the military way of doing things.

The army I knew prior to World War I never considered court-martial procedure as anything other than a form of discipline. Probably it is much improved today; at least I hope so. That army, as it then existed, was imbued not at all with the American spirit of the dignity of the individual. As an institution calculated to accord military justice, it was ignorant, stupid and un-American. It was difficult to believe—had not one seen the thing in operation—that the United States of America—a government of free people—could have sponsored such an instrument so radically and lamentably at variance with the elementary spirit and principles of this republic. These things I say, fully realizing that any military organization must be undemocratic and dictatorial to some extent if it is to survive as a military instrument. But conceding this to be true, still there is always left enough room—and this is the important point of this subject—within which to permit equality in *fundamental* rights of all ranks and the creation of an instrument outside of and beyond the chain of command in an army to enforce such fundamental rights. All that is needed is the *will* to do this. There is none so gross as will believe such instrument may be safely trusted in the hands of the military commander and his subordinates.

We know that the reforms in military law inaugurated after World War I amounted to very little because their administration was confided to the very persons those reforms were calculated to restrain. Thus it ever is with reforms, where the "reformed" carries out the reform program. What is needed is *mandatory statutory revision binding upon the whole military institution from the Commander in Chief down to the lowest rank.* If these reforms are left to the discretion of any official, you may as well forget the whole business. There will be no reform. History demonstrates that the "brass" of the military have always been able to "take into camp" our civilian heads of the armed services. Why this should be so has ever been a mystery to me.

You have heard it said that criminal procedure laws were made to punish the guilty. I say that criminal procedure laws were made to protect the innocent. That was and is and ever should be their paramount objective. Punishment of the guilty, necessary as that is, must always be incidental and complementary to the paramount objective of protecting the innocent. If these laws are just and are honestly, fairly and efficiently administered, the result will be right. Military law is neither just nor fairly administered, and all the special pleading known to man will not supply a remedy for these two glaring defects.

It is the duty of the American Bar Association to persist in its course seeking reform—or more appropriately, creation—of military justice.

EVERETT C. MCKEAGE

San Francisco, California

Sees Contrast Between Court of 1917 and Present Court

■ The writer first appeared before the Supreme Court of the United States in the year 1917. Among the members of the Court at that time were Chief Justice White, a Louisiana Democrat; Mr. Justice Brandeis, a so-called liberal Democrat from Massachusetts; and Mr. Justice Holmes, the great liberal judge concerning whose liberalism hundreds of thousands of words have been written by the exponents of liberalism of our time. Despite political affiliations and despite the so-called liberalism of Brandeis and Holmes, it cannot be denied that each of them had a full and keen appreciation of the dignity required of the members of that Court and of the necessity that its members remain aloof from partisan politics, whether they be those of the National Association of Manufacturers or of the various branches of organized labor.

Without comment I refer the members of the profession to a picture which appeared in recent issues of both *Life* and *Time* magazines showing one of the present members of the Court in attendance at a national convention of the CIO in Portland in a jovial conference with President Murray of the CIO and another national officer of that union.

In connection with this picture there is also a synopsis of the remarks made by the learned Justice to the convention, which remarks might well cause reasonable doubt to arise as to whether their author should hereafter participate judicially in cases which might come before the Court involving the alleged rights

of organized labor, particularly the CIO.

The contrast between the 1917 era of White, Brandeis and Holmes, and the participation of a member of the Court in the 1948 convention of the CIO as is here pictured is indeed startling. Concerning it I make no comment, but leave the matter to the good sense of the profession.

L. L. THOMPSON

Tacoma, Washington

Calls Attention to Citation Error

■ Willis D. Miller, of the Supreme Court of Appeals of Virginia, has kindly called my attention to an error of citation in my article in the JOURNAL, Volume 34, Page 1001, Note 6 (November, 1948). The citation should have been *Bain Peanut Company* v. *Pinson*, et al., 282 U. S. 499, 501 (1931). I now add reference also to *Missouri, Kansas and Texas Railway* v. *May*, 194 U. S. 267, 270, 48 L. ed. 971 (1904).

BEN W. PALMER

Minneapolis, Minnesota

Another Disagreement with Colonel King

■ Colonel Archibald King, whose letter you printed in the December issue of the JOURNAL, has found a few technical flaws in your editorial, but does not touch on the important defect in our system of courts martial. That defect is the fact that the commanding officer can, and frequently does, influence court-martial decisions.

I can prove this by documentary evidence, but the Judge Advocate General of the Army has refused even my Congressman's request to declassify the confidential nature of this material so that it can be quoted. So long as the head of the entire system of military justice insists upon keeping this material secret, it does not come with good grace for any Army official to make statements that can easily be refuted, and at the same time prevent anyone from refuting them. Their insistence on secrecy is in itself a confession that they cannot stand the light of day upon their official actions.

We are pleasantly surprised to note that you continue to maintain your position, and we hope that you will pursue it to the end.

LESTER C. DAVIDSON

Sioux City, Iowa

Recommends Study of the Natural Law

■ Under the heading "The Development of International Law", (34 A.B.A.J. 1125; December, 1948) Louis B. Sohn publishes excerpts from an address by John Foster Dulles on the subject of moral law and international law. Mr. Dulles states:

> The churches can and should say these things and develop a stronger public opinion against war. But that part of the churches' task is the easier part. War has been recurrent throughout the ages, despite its generally acknowledged evilness and most men's preference for peace. For that there must be some basic cause. The churches' further and harder task is to discern that cause and show how it can be overcome.

On the subject of natural law, Monsignor Matthew Smith wrote a 2700-word well documented column entitled "Either Follow Natural Law or Perish". (The *Register*, Denver, Colorado, December 26, 1948). There is a striking parallel between Monsignor Smith's article and Mr. Dulles' statements. Both Mr. Dulles and Monsignor Smith seem to be moved by the well reflected thought that international law, indeed, any law, is based on natural law.

As if accepting the challenge to the churches expressed in the above quoted excerpt from Mr. Sohn's article, Monsignor Smith writes:

> It is our belief that the Catholic Church's emphasis on natural law is largely responsible for democracy in the Western world, and that an emphasis on this law might save civilization from collapse. That these facts are not generally recognized is a sad commentary on the chaos of thinking among even modern educators.

Further, Mr. Dulles says:

> If the organization of peace is dependent on law, it is necessary to have some understanding as to the nature of law. . . . Belief in the dignity and worth of the individual flows from the assumption that the individual is created by God in His image, is the object of God's redemptive love and is directly accountable to God. He therefore has a dignity and worth different than if he were only a part of the natural order. Men, born to be children of God, have rights and responsibilities that other men cannot take from them.

Monsignor Smith writes:

> The Catholic Church has always had, and always will have a supreme respect for the natural law . . . There is definitely such a thing as natural law, which tells us by reason what our rights and duties are. It is called natural because it is implanted in our very nature. Divine revelation emphasizes it, but it is possible for us to know it by reason. It is the voice of conscience, which lets even barbarians know what is right or wrong, if they are sane. One can dull conscience by constant sin, and one can dull the voice of the natural law in the same way, but a law passed by a legislature, or even an ecclesiastical body is not a real law, unless it conforms to the precepts of the natural law. . . It [natural law] is implanted in our rational nature. God made us with it.

It is our opinion that the student of international law will profit much by reading and studying the above two articles in their search for the meaning and understanding of, and in connection with their dissertations on, internal law and international law.

FELIX H. GARCIA

Dallas, Texas

Practising lawyer's guide to the current LAW MAGAZINES

AGENCY – *"Agency To Make Representations":* The case law dealing with the responsibility of superiors for the acts of their "servants" or "agents" has been a source of much confusion for lawyers. The leading article in the December, 1948, issue of the *Vanderbilt Law Review* (Vol. 2—No. 1; pages 1-26), written by Merton Ferson, Visiting Professor of Law at the Vanderbilt University School of Law and Dean Emeritus of the University of Cincinnati College of Law, is an analysis of agency law with respect to the liability of one person for the representations, commands, threats and other utterances by another person. Professor Ferson states that the proper approach to the problem of determining responsibility is by classifying the acts in question, juristic acts being those done for the very purpose of affecting the legal relations of the person for whom they are done, and non-juristic acts being the remainder of human activities. While the juristic act must have been "authorized" to fix responsibility on the principal, the non-juristic act will render the superior liable if performed within the scope of employment. While conceding that there has been uncertainty of result among the cases, he states that representations are inherently non-juristic acts, calling for mere employment rather than authorization, and chargeable to the employer if made within the scope of the employee's employment. (Address: Vanderbilt Law Review, Vanderbilt University, Nashville 4, Tenn.; price for a single copy: $1.50).

ANTI-TRUST LAW—*Monopolies—"Enforcement of the Sherman Act by Actions for Treble Damages":* A method of improving the enforcement of the Sherman Act other than by increasing the staff of the Anti-trust Division of the Department of Justice to provide more adequate policing and prosecution of violations in the traditional methods, is suggested in an article by William Wright Daniel in the November issue of the *Virginia Law Review* (Vol. 34—No. 8; pages 901-926). The author's proposal is that more attention should be given to the treble-damage provisions (Section 7) of the Act, to supplement the more traditional remedies of injunction and criminal action. Beginning with a brief consideration of the problem of proof of damages under Section 7, actions and the trends of these recoveries, the article emphasizes such actions (1) by the United States as an injured purchaser or as *parens patriae,* (2) by a state in its proprietary interest or as *parens patriae,* and (3) by injured persons in a class action or under the "permissive joinder" procedure. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy: $1.25.)

ANTI-TRUST LAW – *"Patent Combinations and the Anti-Trust Laws":* Because the patent law does not give the patentee the right to make, use or sell his invention, but only the right to exclude others from making, using or selling it, the issuance to independent owners of a large number of interdependent patents forced upon industry the institution of the patent pool. In the December issue of *The George Washington Law Review* (Vol. 17—No. 1; pages 59-96), Lawrence I. Wood, General Counsel of the General Electric Company, attempts "to explore and delineate the tortuous line of legality which has evolved from the long running battle between the advocates of a strong patent policy on the one hand and the advocates of a strong anti-trust policy on the other." All of the leading United States Supreme Court cases in the field are discussed and analyzed. Besides "pools" and cross-licensing, license limitations, licensee estoppel, and the function of the court are treated. (Address: The George Washington Law Review, The George Washington University, Washington, D. C.; price for a single copy: $1.00.)

ANTI-TRUST LAW – *"Patents, Procedures and the Sherman Act—The Supreme Court and a Competitive Economy, 1947 Term":* A study of thirteen of the fourteen Supreme Court trade regulation decisions handed down during its 1947 term, grouped according to subject matter, is appearing more or less simultaneously in four separate articles in four different law reviews. Written by Robert C. Bernard of the District of Columbia bar and Sergei S. Zlinkoff of the New York bar, the article in the December issue of *The George Washington Law Review* (Vol. 17—No. 1; pages 1-58) treats seven of the cases under the respective headings: Patents; Procedural Difficulties and the Anti-Trust Laws; Patents and the Sherman Act. Even in such diverse fields as the validity of patents, procedural problems arising in anti-trust litigation, and the interrelation between the scope of the patent privilege and the Sherman Act, the authors believe that a single theme is discernible in the Court's decisions; namely, "The public pol-

icy of free competition embodied in the anti-monopoly statutes is the paramount principle that not only seems to underlie the majority's views in each individual case but also to explain the fundamental relationship between the rulings taken as a whole."

Evasion or delay of anti-trust suits was forestalled by the Court's decisions in the *National City Lines* (334 U.S. 573) and *Scophony* (333 U.S. 795) cases. The substantive scope of the anti-trust laws was broadened by the Court in both the *National Salt* (332 U.S. 30) and the *Mandeville Island Farms* (334 U.S. 219) suits. Because of the monopoly aspects of the patent privilege, strict standards of validity were laid down in the *Funk Seed* (333 U.S. 127) case. The extent to which a patent can be used to fix prices or otherwise interfere with normal competitive processes was sharply limited by the Court's *Gypsum* (333 U.S. 364) and *Line Material* (333 U.S. 287) decisions. (Address: The George Washington Law Review, The George Washington University, Washington, D.C.; price for a single copy: $1.00.)

COMMERCIAL LAW—*"On The Difficulties of Codifying Commercial Law":* In 1940 the American Law Institute and the National Conference of Commissioners on Uniform State Laws undertook the preparation of a comprehensive Commercial Code intended to supplant existing commercial acts and, in addition, cover previously uncodified matter. The leading article in the August, 1948, issue of *The Yale Law Journal* Vol. 57—No. 8; pages 1341-1359) points out the problems necessarily confronting the draftsmen of a work of this magnitude. Grant Gilmore, Assistant Professor of Law at Yale Law School and Assistant Reporter for the article of the proposed Code dealing with secured commercial transactions, is the author of the article. He states that, despite the good features of the Uniform Sales Act which was promulgated in 1906, the effect of the Act as a whole was to perpetuate the split between the law of sales and business practice, while the Revised Sales Act, which is the only article of the proposed Code which has been made publicly available, has made a notable effort to conform law to current business practice. The author also sets forth several *caveats* for the draftsmen of the proposed Code, the first of which is that the Code should be kept in terms of such generality as to permit of an easy application of its provisions to new patterns of business behavior. (Address: The Yale Law Journal, 127 Wall Street, New Haven, Conn.; price for a single copy: $1.00.)

COMMERCIAL LAW—*"Remedies for Total Breach of Contract under the Uniform Revised Sales Act":* A comment in the August, 1948, issue of *The Yale Law Journal* (Vol. 57—No. 8; pages 1360-1388) contrasts the remedies available under the Uniform Sales Act with the buyers' and sellers' remedies provided by the proposed Uniform Revised Sales Act which is intended to be submitted to the states for adoption as a part of the new Commercial Code. The author takes the position that, while the new Act places a desirable emphasis on harmonizing the law with commercial practice, it has failed to supply sanctions sufficient to ensure performance of contractual obligations regardless of the vicissitudes of fluctuating markets. He suggests that a detailed study of commercial practices will be necessary to provide accurate data with which to determine how strong a sanction may be required to ensure performance of contracts, guard against compromise of claims to the detriment of innocent parties and remove the remaining barriers to full compensation for the value of the promised performance. (Address: The Yale Law Journal, 127 Wall Street, New Haven, Conn.; price for a single copy: $1.00.)

CORPORATIONS — *"Corporate Financing Through the Sale and Lease-Back of Property":* The leading article in the November, 1948, issue of the *Harvard Law Review* (Vol. 62—No. 1; pages 1-41), entitled as above, and written by Professor William L. Cary, of the Northwestern University School of Law, analyzes extensively the business, tax and political considerations of the sale and lease-back transactions which have been utilized by corporations, particularly in recent years, to effect tax savings and also to raise capital. Reference is made to several case studies to demonstrate the feasibility of the device. The author considers that the sale and lease-back device continues to perform a legitimate and highly useful function although he cautions that limitations must be expected on its efficacy for tax purposes and as a continuous method for raising capital funds. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: $1.00).

DOMESTIC RELATIONS—*"Divorces by the Consent of the Parties and Divisible Divorce Decrees":* A discussion of the effect of two pairs of divorce cases coming out of the United States Supreme Court in June appears in the November-December, 1948, issue of the *Illinois Law Review* (Vol. 43—No. 5; pages 608-622). These cases, according to the authors of this article, Professors Homer F. Carey and Brunson MacChesney of Northwestern University School of Law, bring into contrast the relative constitutional positions in other states of decrees rendered *ex parte,* and those rendered upon personal jurisdiction over the defendant. The first pair of cases, *Sherrer* v. *Sherrer,* 334 U.S. 343 (1948), and *Coe* v. *Coe,* 334 U.S. 378 (1948), involved the constitutional force in Massachusetts of divorce decrees obtained in Florida and Nevada, respectively, upon personal appearance there by the respective defendants. The other pair of cases, *Estin* v. *Estin,* 334 U.S. 541 (1948) and *Kreiger* v. *Kreiger,* 334 U.S. 555 (1948) involved the question of whether a decree of divorce granted *ex parte* by the court of the

husband's domicile might be denied recognition insofar as the husband relies upon it to destroy the support provisions of a prior valid separation decree obtained by the wife in another state, the matrimonial domicile. After analyzing the divergent effects extra-territorially of *ex parte* decrees and those based on personal jurisdiction of both parties, the authors conclude that certainty and uniformity in this controversial area, can be achieved only by federal legislative action. (Address: Illinois Law Review, Northwestern University School of Law, Chicago, Ill.; price for a single copy: $1.00.)

INSURANCE—*"Insurance Against the Consequences of Wilful Acts":* An article, entitled as above and written by Frank W. Woodhead, Assistant General Counsel of Pacific Employers Mutual Insurance Company, appears in the November issue of the *Insurance Journal* (No. 310; pages 867-881). Mr. Woodhead considers the subject-matter of his article in the light of the most important statutes imposing restrictions upon the attempt of a person to purchase indemnity insurance for his deliberate wilful acts. He concludes that, insofar as third party liability insurance is concerned, the majority rule is that assault by an assured's employee may be considered as "accidental", within the limits of an insurance policy. (Address: Insurance Law Journal, 214 North Michigan Avenue, Chicago 1, Ill.; price for a a single copy: $1.00).

PRACTICE — *"Oral Advocacy":* Frederick Bernays Wiener, formerly Assistant to the Solicitor General of the United States, is the author of a serviceable essay, entitled as above, in the November, 1948, issue of the *Harvard Law Review* (Vol. 62—No. 1; pages 56-75), on points to be considered by the lawyer who is preparing for oral argument in an appellate court. It is stated that the article is based upon a chapter from the author's forthcoming book entitled *Appellate Advocacy*. It appears that the author draws chiefly upon his own observation of arguments before the Supreme Court of the United States while he was serving on the staff of the Solicitor General. He stresses the importance of careful preparation for argument, the avoidance of reading and the necessity for applying the fundamentals of good public speaking. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy. $1.00).

STATUTES—*"Statute Law and its Interpretation in the Modern State":* Professor W. Friedmann, of the University of Melbourne, is the author of the leading article in the November, 1948, issue of the *Canadian Bar Review* (Vol. 26—No. 9; pages 1277-1300), entitled as above, in which he explores the various approaches to statutory construction in view of the increasing importance of statute law in the legal life of modern communities. He compares the analytical or traditional approach with the so-called "social purpose" approach and the "creative intuition" approach, which have been favored by those who have felt that in recent years the traditional approach to the construction of a statute too often fails to give effect to the needs of the modern community. However, Professor Friedmann finds no single approach sufficient and believes that more stress should be placed upon the nature of the statute which is to be construed to determine which approach should be followed by the court in a given case. (Address: Canadian Bar Review, Room 505, Ottawa Electric Building, Ottawa, Ontario; price for a single copy: $1.00).

TAXATION — *"Federal Tax Problems Relating to Property Owned in Joint Tenancy and Tenancy by the Entirety":* A very substantial part of the real estate (and, to a lesser extent, savings bank deposits) owned by American married couples is owned by them in joint tenancy or tenancy by the entirety. The inadequately recognized tax consequences peculiar to these tenancies are discussed by Professor Harry J. Rudick in the November issue of the *Tax Law Review* (Vol. 4—No. 1; pages 3-33.) The Revenue Act of 1948 has, for possibly the majority of such tenancies, removed some of the tax problems as a practical matter but it leaves many others and adds a few of its own. Estate tax, gift tax and income tax problems consequent on the creation of such estates are separately considered and dealt with on a practical basis. Perhaps the most widely significant and least appreciated problem referred to is that of the surviving tenant. Unaffected by the Revenue Act of 1948, the cases and rulings are uniform to the effect that the basis of the surviving joint tenant or tenant by the entirety (for computing gains) is the original cost of the property, notwithstanding the fact that part or all of the property may have been included in the cost estate of the decedent tenant for federal estate tax purposes. (Address: Tax Law Review, New York University School of Law, 100 Washington Square East, New York 3, N. Y.; price for a single copy: $1.00).

TORTS—*"Defamation by Radio: A Reconsideration":* Professor R. C. Donnelly, of the University of Virginia Law School, is the author of an article in the November, 1948, issue of the *Iowa Law Review* (Vol. 34—No. 1; pages 12-40), on the question whether defamation by radio is libel, slander or a new tort. Many recent decisions in this field are reviewed, and the author concludes that the impact of radio on the law of defamation has focused attention upon the following proposals: (1) that defamatory statements made over the radio, whether read from a manuscript or interpolated, be classified as libel and not slander; (2) that for defamation contained in programs not presenting adverse views on questions and persons of public interest, the radio station be held to strict liability; (3) that Sec-

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tion 315 of the Communications Act of 1934 prohibits a radio station from censoring the speeches of candidates for public office, and perforce insulates the station from liability for defamatory utterances made by such candidates; (4) that the pending White Bill is meritorious in extending the "reply" provisions of Section 315 to include discussion of proposed legislation and public questions of a controversial nature, and in explicitly relieving the radio station from liability for defamation. (Address: Iowa Law Review, College of Law, Iowa City, Iowa; price for a single copy: $1.00).

TORTS — *"The Right of Reply: An Alternative to an Action for Libel":* The November issue of the *Virginia Law Review* (Vol. 34—No. 8; pages 867-900) presents an article advocating the passage of appropriate laws in this country, other than in Nevada where such a law now exists, granting the absolute right to a person who has been defamed by a publication to reply to the defamatory statements in the same publication. The author, Richard C. Donnelly, states that such a remedy would make it possible for a person who feels aggrieved by a statement in the press to defend his reputation without having to resort to a lawsuit for damages and would also provide him with a form of relief more appropriate to the type of harm sustained. The author believes also that such a law would improve the services of newspapers and other media for mass communications as instrumentalities for the dissemination of conflicting and divergent points of view. Foreign laws of similar import are cited. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va; price for a single copy: $1.25).

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Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman.

Non-Taxable Stock Dividends and Rights

■ One of the most common and baffling problems which confronts investors, large and small, as March 15 approaches is the treatment of stock dividends—particularly the non-taxable variety. With this in mind we are devoting our page this month to a restatement of the rules in the hope that this may be of some assistance to our readers in the preparation of their own and their clients' returns.

A dividend paid in the stock of the issuing corporation is non-taxable when it does not change the proportionate interests of the shareholders in the corporation. *Helvering* v. *Sprouse*, 318 U.S. 604. The theory is that the shareholder's investment in the enterprise has been changed (augmented) in form only. He holds a few more shares, but so does everyone else. A dividend of common on common is the simplest example; but a dividend payable in stock of a different class may also be non-taxable if the proportionate-interest test is met. Thus the issuance of preferred stock to common shareholders will be non-taxable if at the time the corporation has no preferred outstanding. The issuance of the stock may be preceded by an issue of "rights"—options to the shareholders to subscribe for the new stock at a price. This does not alter the situation provided the stock itself would be non-taxable if issued directly and without further payment by the shareholders.

A taxable stock dividend, on the other hand, is one payable in the stock of another corporation or one which changes the proportionate interests of the shareholders. The most common example of the latter type is a dividend to common shareholders payable in preferred stock of a class already outstanding. (Incidentally a corporation which proposes to distribute preferred stock on its common should understand that, while the initial issue of preferred will be non-taxable, the process cannot be repeated without subjecting its shareholders to a tax based on the fair value of the preferred.)

The problem whether the new stock is taxable or non-taxable usually presents little difficulty to the investor-taxpayer. Most corporations advise their shareholders on this point at the time the stock is issued. The trouble comes when the shareholder sells some of his stock, new or old, or sells, instead of exercising, his rights to subscribe. Assuming that the dividend is non-taxable, the shareholder's gain or loss in the sale transaction and in any subsequent sale of his remaining stock will depend upon the apportionment of his basis or cost between the stock or rights which he sells and the stock which he retains. His original investment in the corporation remains unchanged; but with the issuance of the dividend stock, this investment is represented by additional shares, and the shareholder's cost or basis must in some way be spread over all his holdings, new and old, and a new per-share basis must be determined.

The operation of the rules for apportionment of basis in connection with non-taxable stock dividends may best be illustrated by examples. Assume that the taxpayer holds 100 shares of common stock (in each of the corporations mentioned below) which he purchased in 1946 for $10 per share or $1000 in all.

(1) The *A* corporation issues a 10 per cent stock dividend payable in common stock, one share for ten. He now owns 110 shares still at a cost of $1000, and his new per-share basis is $9.09. His gain or loss upon a subsequent sale of either new or old stock will be computed on this basis. The same formula would of course apply to fractional shares. If, for example, the dividend had been one share for eight (instead of ten) the taxpayer would have received twelve new whole shares and a scrip certificate for one-half additional share, and would now own 112.5 shares at $8.88 per share or $4.44 for the scrip. Sale of the scrip at $6 will produce a taxable gain of $1.56.

(2) The *B* corporation with only common outstanding issues a preferred stock dividend, one share of $10 par preferred for each ten shares of common. The taxpayer's cost is still $1000. The apportionment of this cost between his 100 shares of old common and his 10 shares of new preferred is based upon the relative values of the two classes at the time of issuance. If the market value of the common (ex-dividend) is $15 (or $1500 for 100 shares) and of the preferred $12 (or $120 for 10 shares), the preferred represents 120/1620 of the total value, or 7.4%, and the common represents the rest, or 92.6%. The taxpayer's basis of $1000 is apportioned accordingly: to the 10 shares of preferred, 7.4% or $74 or $7.40 per share; to the 100 shares of common, 92.6% or $926 or $9.26 per share.

(3) The *C* corporation issues rights to subscribe for one share of additional common stock for each 10 shares owned, at a price of $10 per share. The common is now worth $15 per share (ex-rights) and the rights applicable to the purchase of one new share are salable at $5. The apportionment of the taxpayer's $1000 cost again depends upon these relative values. His rights to purchase 10 new shares are worth $50 and his 100 shares of old common are worth $1500. The value represented by the rights is therefore 50/1550, or about 3.2% of the whole, and the $1000 cost is apportioned: to the rights, 3.2% of $1000, or $32; to the old common, 96.8% of $1000, or $968, or $9.68 per share. A sale of the rights at $50 will produce a taxable gain of $18. If the taxpayer exercises the rights he will pay $100 (the subscription price) and receive ten new shares. The basis of these new shares will be $100 (the amount paid) plus $32 (the basis of the old shares allocated to the rights), that is $132 or $13.20 per share.

The complications are multiplied when the original stock was purchased at different times and different prices. The identification of particular shares of the dividend stock with particular blocks of the original stock presents practical difficulties, since the dividend stock is normally issued in one certificate. In the absence of identification should a sale of part of the dividend stock (a scrip certificate, for example) be attributed to the earliest purchase under the first-in-first-out rule, or may the taxpayer use an average per share basis for all the dividend stock? Compare *Block* v. *Commissioner*, 148 F. (2d) 452; Treasury Regulations 111, Section 29.113(a) (12)–1.

One further quirk should be mentioned in connection with non-taxable stock dividends. The holding period of the dividend stock and rights goes back to the acquisition date of the original stock. Section 117(h)(5) of the Internal Revenue Code. This means that if the original stock has been held more than six months, any gain from the sale—even the immediate sale—of the dividend stock or rights will be "long-term" and only fifty per cent taxable. But there is one catch: if rights are issued *and exercised,* the holding period of the stock so acquired starts with the date of exercise, even though the rights which were turned in for part of the purchase price had a much longer holding period. Section 117 (h)(6).

The nuisance factor of a non-taxable stock dividend is extremely heavy, and the taxpayer may be tempted, at least in the case of scrip and subscription rights, to treat the proceeds as a taxable cash dividend. Do not succumb to this temptation. The only result will be to overpay your tax for the current year. The scrip and the rights have carried away a part of your original basis, whether you like it or not, and when you eventually sell your remaining shares you will find your gain increased accordingly. The taxpayer has no election to treat such dividends as taxable.

There is one—and only one—way to avoid the complex allocation-of-basis problems discussed above: Do not sell any of your holdings in a corporation which has issued non-taxable stock dividends until you are ready to sell them all. This includes scrip and rights as well as whole shares. Always *exercise* the rights and *purchase* the necessary additional scrip to eliminate fractional shares, and (in order that all your holdings may be long term) do not sell anything until at least six months after the exercise of the rights. Then when you sell out all your stock, you need only add up all you have paid, both for the original stock and upon the exercise of rights and the purchase of scrip, and that will be your basis for the determination of gain or loss on the sale.

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OUR YOUNGER LAWYERS

Charles H. Burton, Secretary and Editor-in-Charge, Washington, D. C.

▪ A Regional Meeting of the Fifth Circuit was held at Gulfport, Mississippi, on December 11. Randolph W. Thrower, Atlanta, Georgia, Fifth Circuit Council Member, planned the well attended, successful meeting. Those in attendance included W. Carloss Morris, Jr., Houston, Texas, JBC National Vice Chairman; Lewis R. Donelson III, Memphis, Tennessee, National Director of the Public Information Program; Billy H. Quin, Vicksburg, Mississippi; B. C. Gardner, Jr., Albany, Georgia; Albert L. Roemer, Montgomery, Alabama; Harvey H. Posner, Baton Rouge, Louisiana; Sam A. Myar, Jr., Memphis, Tennessee; James W. Garrett, Montgomery, Alabama.

A detailed discussion was held on the major projects of the Conference and their local application. The projects receiving the most attention were the Public Information Program, relations with law students and membership.

Mr. Donelson led the discussion concerning the Public Information Program. Records were played illustrating the different types of radio programs sponsored by the Junior Bar Conference, including examples of the "Law in Action" series, where local lawyers discuss such subjects as contracts, torts, wills, etc. A similar series on the United Nations entitled "Larger Freedom", consisted of dramas featuring movie stars Ronald Regan, Douglas Fairbanks, Jr., Edward G. Robinson and William Bendix. JBC Vice Chairman W. Carloss Morris pointed out various modifications which have been made in these series by bar associations adopting them in part.

It was recognized that in many instances it was for practical purposes necessary to find some compromise between a program involving local lawyers which requires a great deal of work, and a "canned" program requiring little work but which necessarily has much less local appeal. For the current year Mr. Donelson suggested as a possible solution for this problem the adoption of programs entitled "What Your Legislature Has Done This Week". He pointed out that approximately forty legislatures were meeting this year and that a real public service could be rendered by interesting people in the work of their legislature. Such a program, according to Mr. Donelson, should cover only controversial issues if all views of a question are represented by speakers. They should deal principally with important bills filed, action of the committees, bills passed or defeated and the Governor's action on pending bills.

Other problems raised at this Fifth Circuit included the matter of obtaining radio time, explaining the purpose of the programs to local Bar groups, the need for obtaining a wider coverage by directing the programs to large groups of farmers and industrial workers, the proper use of names on the programs and the acknowledgments as to sponsorship of the programs. A state-by-state analysis of the PIP within the Fifth Circuit found successful programs in process or already completed in Florida, Georgia, Louisiana and Texas and plans for new programs being made in all states in that Circuit. The preparation of a panel of lawyers available for speeches before civic clubs, schools, PTA groups, etc., was recommended. It was suggested that these would be in demand particularly on the historic dates of the nation or state. The distribution of pamphlets on such subjects as wills and trusts was also explained.

The matter of relations with law

Left to right (seated) Lawrence E. Corcoran, Boston, Massachusetts State Chairman; William R. Eddleman, Seattle, National Chairman, JBC; (Back row) Stanley M. Brown, Manchester, N. H.; 1st Circuit Council Member; Richard H. Bowerman, New Haven, Conn.; 2nd Circuit Council Member, and Frederick P. O'Connell, Kennebunk, Me.

students was recognized as a major responsibility of the Conference within the Circuit. Mr. Thrower outlined the aims of the Conference within this field and the general development of this activity over the past several years. It was recognized that work with law students is facilitated where there exists in the law school a law students' association. Such student associations can assist in securing speeches by practicing lawyers on the various problems of the graduating lawyer, and in arranging for visits to courts, record rooms, law offices, etc. Mr. Posner explained the placement work being done in Baton Rouge with the senior law students of Louisiana State University, and Mr. Garrett discussed the type of "clinic" held at the University of Alabama where ten practicing lawyers spend a day speaking to the law students on the problems of undertaking the practice of law. Considerable interest was shown in the type of pamphlet material prepared in Alabama and Michigan for graduating law students giving them a helpful analysis to aid in their selection of a city or town in which to practice.

Preliminary plans were also made for carrying forward the JBC membership program. The immediate need in this field was found to be the accumulation of the minimum "tools" required for such a program. These include an accurate list of present members, a list of practicing lawyers of the state with their residences, ages and an accurate list of lawyers currently being admitted to practice. The new membership rate of $3.00 per year for attorneys admitted to practice for less than two years was recognized as a great aid in securing newly admitted lawyers for membership.

A joint meeting of the First and Second Circuits was held in Boston, Massachusetts, on November 12, 1948. It was attended by National Chairman William R. Eddleman, Seattle, Washington, on his recent trip through the New England states. Stanley M. Brown, Manchester, New Hampshire, and Richard H. Bowerman, New Haven, Connecticut, Council Members for the First and Second Circuits respectively, outlined excellent programs for their Councils at this meeting.

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Arkansas

The undersigned hereby nominate Edward L. Wright, of Little Rock, for the office of State Delegate for and from the State of Arkansas to be elected in 1949 for a three-year term beginning at the adjournment of the 1949 Annual Meeting:

A. W. Dobyns, William Nash, Howard Cockrill, Leon B. Catlett, John E. Coates, Jr., Osro Cobb, Terrell Marshall, Verne McMillen, June P. Wooten, Herschell Bricker, E. L. McHaney, Jr., Frank J. Wills, Walter E. Paul, of Little Rock;

Jos. M. Hill, Harry P. Daily, Henry L. Fitzhugh, Floyd E. Barham, G. Byron Dobbs, of Fort Smith;

Frank G. Bridges, Jr., Hendrix Rowell, Jay W. Dickey, Palmer Danaher, A. F. Triplett, Louis L. Ramsay, Jr., Nicholas J. Gantt, Jr., of Pine Bluff.

Louisiana

The undersigned hereby nominate LeDoux R. Provosty, of Alexandria, for the office of State Delegate for and from the State of Louisiana to be elected in 1949 for a three-year term beginning at the adjournment of the 1949 Annual Meeting:

Marion K. Smith and Edwin F. Hunter, Jr., of Shreveport;

John H. McSween, C. F. Gavel, Jr., R. S. Thornton and B. Newton Hargis, of Alexandria;

W. T. McCain, of Colfax;

C. E. Laborde, Jr., of Marksville;

P. S. Gaharan, Jr., of Jena;

H. Payne Breazeale, Victor A. Sachse, M. J. Wilson, Robert P. Breazeale and C. V. Porter, of Baton Rouge;

Fred G. Hudson, Jr., Murray Hudson and Henry Bernstein, Jr., of Monroe;

Geo. T. Madison, of Bastrop;

J. Barnwell Phelps, W. B. Spencer, Jr., Leon Sarpy, Robert G. Polack, Harry McCall, Louis B. Claverie and Jack A. Bornemann, of New Orleans.

Ohio

The undersigned hereby nominate Donald A. Finkbeiner, of Toledo, for the office of State Delegate for and from the State of Ohio to be elected in 1949 for a three-year term beginning at the adjournment of the 1949 Annual Meeting:

Andrew S. Iddings, R. E. Cowden and Eugene A. Mayl, of Dayton;

W. B. McLeskey, Wm. E. Knepper and Frank C. Dunbar, Jr., of Columbus;

Wm. A. Mason, Harold B. Doyle and Robert A. Manchester II, of Youngstown;

Howard L. Barkdull, H. Austin Hauxhurst, George B. Harris, Wm. R. VanAken, David A. Gaskill, Jay P. Taggart and Jos. C. Hostetler, of Cleveland;

Murray M. Shoemaker, Morison R. Waite, Herbert Shaffer and Herman A. Bayless, of Cincinnati;

Joseph D. Stecher, Harry S. Bugbee, Frazier Reams and Michael V. DiSalle, of Toledo.

Bar Association News

Richard B. Allen • Editor-in-Charge

Illinois Bar Prominent in Drafting New Rules for Criminal Cases

■ With Justice Rutledge's trenchant concurring opinion in *Marino* v. *Ragen*, 332 U. S. 561 (1947), (34 A.B.A.J. 148; February, 1948), the Supreme Court of the United States focussed attention on the criminal law of Illinois as it related to provision for counsel for accused and for post-conviction proceedings in criminal cases. What has been done in the year since that decision by the organized Bar of the state and the state's supreme court forms a shining chapter in the book of bar associations' accomplishments.

Prior to the decision in the *Marino* case, the Board of Governors of the Illinois State Bar Association had requested the Section of Criminal Law to give attention to the problem of post-conviction proceedings in Illinois. Likewise the Board of Managers of the Chicago Bar Association had constituted a Committee on Habeas Corpus Proceedings to study the same subject. At its February, 1948, meeting, the Board of Governors of the state association determined that there was need in Illinois for substantial improvement in the procedure on arraignments in criminal cases, particularly with regard to appointment of counsel. The Board was also of the opinion that the Illinois procedural law as to post-conviction proceedings required study, revision and improvement. The best solution to these two problems was thought to lie in promulgation of new rules of court by the Supreme Court of Illinois, and this was concurred in by the Committee of the Chicago Bar Association.

When this deliberation and solution was presented to the Supreme Court, it also concurred; both associations were invited to send representatives to a conference, which was held on March 8, 1948, and covered not only the matter of appointment of counsel, but also the procedural problems involved in the present Illinois law governing post-conviction proceedings. On March 19 Loren E. Murphy, then Chief Justice, said that the Court was of the opinion that there was a need for a rule with regard to appointment of counsel and invited the joint committee of the Illinois State and Chicago Bar Associations, which had been previously appointed, to submit such a rule for action by the Court at its May, 1948, term.

Members of the joint committee were William H. Alexander, Thomas M. Clarke, James V. Cunningham, John J. Faissler, Cornelius J. Harrington, Albert E. Jenner, Jr., Wilber G. Katz, James C. Leaton, Stephen A. Mitchell, Erwin W. Roemer, Walter V. Schaefer, August J. Scheineman, John R. Snively, William Scott Stewart, Alexander J. Strom, Harold N. Ward, William C. Wines and Edward Wolfe.

The proposed rule respecting appointment of counsel was submitted to the Court on April 21, and, with some changes, the rule was promulgated by the Court to be effective September 1, 1948. The rule, which goes beyond the minimum constitutional requirements, has been hailed as a model and is, in the belief of the Committee, the first rule of its character promulgated by a reviewing court. It provides:

> In all criminal cases wherein the accused upon conviction shall, or may, be punished by imprisonment in the penitentiary, if, at the time of his arraignment, the accused is not represented by counsel, the court shall before receiving, entering, or allowing the change of any plea to an indictment, advise the accused he has a right to be defended by counsel. If he desires counsel, and states under oath he is unable to employ such counsel, the court shall appoint competent counsel to represent him. The court shall not permit waiver of counsel, or a plea of guilty, by any person accused of a crime for which upon conviction, the punishment may be imprisonment in the penitentiary, unless the court finds from proceedings had in open court that the accused understands the nature of the charge against him, and the consequences thereof if found guilty, and understands he has a right to counsel, and understandingly waives such right. The inquiries of the court, and the answers of the defendant to determine whether the accused understands his rights to be represented by counsel, and comprehends the nature of the crime with which he is charged, and the punishment thereof fixed by law, shall be recited in, and become part of the common law record in the case; provided, in no case shall a plea of guilty be received or accepted from a minor under the age of eighteen years, unless represented by counsel.

The Committee has pointed out that the oustanding features of this rule are:

(1) It requires that the matter of the accused's representation by counsel be inquired into *before* the accused is arraigned and also on any occasion of a change in a prior plea.

(2) It applies in all cases in which punishment may be by imprisonment in the penitentiary, thus going beyond the requirements of state and federal constitutions which do not require counsel in non-capital cases unless the facts are extremely complicated or unusual. *Carter* v. *Illinois*, 329 U. S. 173.

(3) It requires not only that the accused be advised of his right to counsel, but that he also be advised of the nature of the crime charged. Heretofore, the latter requirement has obtained only when there was a plea of guilty.

(4) It requires that the court convince itself that a waiver of counsel is "understandingly" made. This is particularly important in cases involving minors, possible insanity of the accused, or illiterates or persons

of foreign birth (as involved in the *Marino* case).

(5) It requires that the questions of the court and the responses of the accused be recited in and made a part of the common law record. This is termed by the Committee as "perhaps the outstanding feature" of the rule, inasmuch as heretofore the common law record consisted merely of formal recitals inserted by the clerk.

(6) It requires that no plea of guilty may be received from a minor under eighteen unless he is represented by counsel.

Following adoption of this rule by the Court, the joint Committee worked throughout the summer on a rule as to post-conviction proceedings. A petitioner's "dilemma" under Illinois law on this subject was particularly criticized by Justice Rutledge in the *Marino* opinion. A proposed draft was submitted to the Supreme Court at its September, 1948, term, and a conference between a sub-committee of the Court and the joint committee of the two associations was held November 4, but no action was taken by the Court thereafter. Thus far the Court, overwhelmed with a heavy calendar, has not promulgated the rule. The proposed draft of the rule relating to post-conviction hearings is as follows:

(1) Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois may institute a proceeding under this rule. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. Petitioner shall also serve another copy upon the state's attorney by any of the methods provided in Rule 7. The clerk shall docket the petition upon his receipt thereof and bring the same promptly to the attention of the court. No proceeding under this rule shall be commenced more than five years after rendition of final judgment, or more than three years after the adoption of this rule, whichever is later, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence.

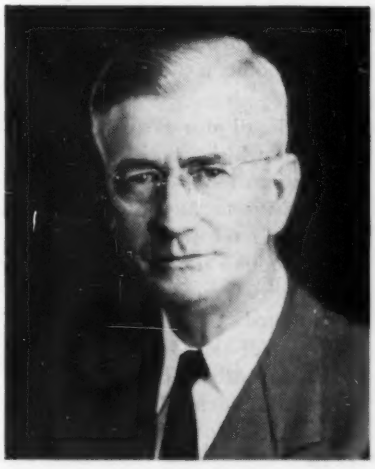
(2) The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and shall clearly set forth the respects in which petitioner's constitutional rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition.

(3) Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived.

(4) If the petition alleges that the petitioner is unable to pay the costs of the proceeding, the court may order that the petitioner be permitted to proceed as a poor person. If the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel.

(5) Within thirty days after the filing and docketing of the petition, or within such further time as the court may fix, the State shall answer or move to dismiss. No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party. The court may in its discretion grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition. The court may in its discretion make such orders as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable and as is generally provided in Rule 8 of this court and Section 46 of the Civil Practice Act.

(6) The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former



Albert J. Henderson
President, Georgia Bar Association

proceedings and such supplementary orders as to rearraignment, retrial, custody, bail or discharge as may be necessary and proper.

(7) Any order dismissing the petition and any order entered after trial of the issues shall be final unless reversed on writ of error from this court brought within one year from the rendition of the order.

Georgia Bar Recommends "Modified Missouri Plan"

■ The Board of Governors of the Georgia Bar Association met in special session at Atlanta on December 3 to discuss various bills proposed to be introduced in the 1949 session of the General Assembly of Georgia.

Perhaps the most ambitious legislation to receive the Board's recommendation is a bill providing for a "modified Missouri plan" for removing selection of both appellate and trial judges from state politics. Under the plan proposed by the Committee on Jurisprudence, Law Reform and Procedure, nominating commissions will be chosen by non-political groups. These commissions will then send a list of recommended candidates for judicial appointment to the Governor, who will be bound to appoint judges from the list. Thereafter, as the term of a judge expires, his name will be placed on the general election ballot with the simple question, "Shall Judge Blank be returned to office for another term?" If the vote on this question is affirmative, the judge is elected; if

negative, the commission submits another list of names, and the Governor appoints a successor from that list.

The Board also gave its approval to a bill which provides for minimum education requirements as a prerequisite to admission to practice. A resolution favoring an amendment to the state code which would allow women to serve on juries was adopted.

Officers of the Georgia Bar Association are Albert J. Henderson, of Canton, President; Homer C. Eberhardt, of Valdosta, Vice President; Maurice C. Thomas, of Macon, Secretary; and J. Wilson Parker, of Atlanta, Treasurer.

Colvin-Heyn Studio

Abel V. Shotwell
President, Nebraska State Bar Association

Fabian Bachrach

Frank Talbott, Jr.
President, Virginia State Bar

Virginia State Bar Favors Judges' Conference

■ A report recommending an annual conference of all judges of record in Virginia under the leadership of the Chief Justice of the Supreme Court of Appeals was adopted at the tenth annual meeting of the Virginia State Bar. The meeting was held at Roanoke on August 12, 1948.

Other reports adopted at the meeting recommended appointment of an executive assistant to the Supreme Court of Appeals, better provisions for retirement of judges in the state and that severance in cases of joint indictment be made a matter for the court's discretion. A report favoring provision by the Virginia State Bar of advertising mats for local bar associations was referred to the Council for action at its next meeting.

Frank Talbott, Jr., of Danville, was elected president for the year beginning September 1, 1948. Thomas W. Phillips, of Arlington, and Russell E. Booker, of Richmond, were elected vice president and secretary-treasurer respectively.

Abel V. Shotwell Heads Nebraska Bar

■ Abel V. Shotwell, of Omaha, was elected President of the Nebraska State Bar Association during its forty-ninth annual meeting at Omaha November 18 and 19. Other officers chosen at the meeting, which had a near-record attendance of 600, were Seymour L. Smith, of Omaha, Lewis R. Ricketts, of Lincoln, and James D. Conway, of Hastings, Vice Presidents; Laurens Williams, of Omaha, member-at-large of the Executive Council; and Paul E. Boslaugh, of Hastings, member of the House of Delegates of the American Bar Association.

Frank E. Holman, President of the American Bar Association, and William R. Eddleman, Chairman of the Association's Junior Bar Conference, spoke at a luncheon given under the auspices of the Junior Bar Conference. Loyd Wright, of Los Angeles, California, a member of the Board of Governors of the American Bar Association, and William J. Casey, of New York, chairman of the editorial board of the Research Institute of America, addressed other sessions of the two-day meeting.

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Law Lists: Certificates Issued by Special Committee

■ Publishers of the law lists and legal directories listed below have received from the Special Committee on Law Lists of the American Bar Association, as to the list of lawyers' names in their 1949 editions, a certificate of compliance with the Rules and Standards as to Law Lists.

Commercial Law Lists

A. C. A. List
(October, 1948-1949 Edition)
Associated Commercial Attorneys List
92 Liberty Street
New York 6, New York

American Lawyers Quarterly
The American Lawyers Company
1712 N. B. C. Building
Cleveland 14, Ohio

Attorneys List
United States Fidelity and Guaranty Company
Redwood and Calvert Streets
Baltimore 3, Maryland

B. A. Law List
The B. A. Law List Company
161 West Wisconsin Avenue
Milwaukee 3, Wisconsin

Clearing House Quarterly
Attorneys National Clearing House Company
1645 Hennepin Avenue
Minneapolis 3, Minnesota

The Columbia List
The Columbia Directory Company, Inc.
320 Broadway
New York 7, New York

THE COMMERCIAL BAR
The Commercial Bar, Inc.
521 Fifth Avenue
New York 17, New York

C-R-C ATTORNEY DIRECTORY
The C-R-C Law List Company, Inc.
50 Church Street
New York 7, New York

FORWARDERS LIST OF ATTORNEYS
Forwarders List Company
38 South Dearborn Street
Chicago 3, Illinois

THE GENERAL BAR
The General Bar, Inc.
36 West 44th Street
New York 18, New York

INTERNATIONAL LAWYERS LAW LIST
International Lawyers Company, Inc.
33 West 42nd Street
New York 18, New York

THE MERCANTILE ADJUSTER
The Mercantile Adjuster Publishing Company
10 South LaSalle Street
Chicago 3, Illinois

THE NATIONAL LIST
The National List, Inc.
75 West Street
New York 6, New York

RAND MCNALLY LIST OF BANK RECOMMENDED ATTORNEYS
Rand McNally & Company
536 South Clark Street
Chicago 5, Illinois

THE UNITED LAW LIST
The United Law List Company, Inc.
280 Broadway
New York 7, New York

WRIGHT-HOLMES LAW LIST
Wright-Holmes Corporation
225 West 34th Street
New York 1, New York

General Law Lists

AMERICAN BANK ATTORNEYS
American Bank Attorneys
18 Brattle Street
Cambridge 38, Massachusetts

THE AMERICAN BAR
The James C. Fifield Company
1645 Hennepin Avenue
Minneapolis 3, Minnesota

THE BAR REGISTER
The Bar Register Company, Inc.
1 Prospect Street
Summit 1, New Jersey

CAMPBELL'S LIST
Campbell's List, Inc.
140 Nassau Street
New York 7, New York

CORPORATION & ADMINISTRATIVE LAWYERS DIRECTORY
Central Guarantee Company, Inc.
141 West Jackson Boulevard
Chicago 4, Illinois

THE LAWYERS DIRECTORY
The Lawyers Directory, Inc.
18 East Fourth Street
Cincinnati 2, Ohio

THE LAWYERS' LIST
Law List Publishing Company
111 Fifth Avenue
New York 3, New York

RUSSELL LAW LIST
Russell Law List
527 Fifth Avenue
New York 17, New York

General Legal Directory

MARTINDALE-HUBBELL LAW DIRECTORY
Martindale-Hubbell, Inc.
1 Prospect Street
Summit 1, New Jersey

Insurance Law Lists

BEST'S RECOMMENDED INSURANCE ATTORNEYS
Alfred M. Best Company, Inc.
75 Fulton Street
New York 7, New York

HINE'S INSURANCE COUNSEL
Hine's Legal Directory, Inc.
38 South Dearborn Street
Chicago 3, Illinois

THE INSURANCE BAR
The Bar List Publishing Company
State Bank Building
Evanston, Illinois

THE UNDERWRITERS LIST
Underwriters List Publishing Company
175 West Jackson Boulevard
Chicago 4, Illinois

Probate Law Lists

RECOMMENDED PROBATE COUNSEL
Central Guarantee Company, Inc.
141 West Jackson Boulevard
Chicago 4, Illinois

SULLIVAN'S PROBATE DIRECTORY
Sullivan's Law Directory
189 W. Madison Street
Chicago 2, Illinois

State Legal Directories

The following state legal directories published by

THE LEGAL DIRECTORIES PUBLISHING COMPANY
5225 Wilshire Boulevard
Los Angeles 36, California

INDIANA LEGAL DIRECTORY
IOWA LEGAL DIRECTORY
KANSAS LEGAL DIRECTORY
MISSOURI LEGAL DIRECTORY
OHIO LEGAL DIRECTORY
PACIFIC COAST LEGAL DIRECTORY FOR STATES OF ARIZONA, CALIFORNIA, NEVADA, OREGON AND WASHINGTON
TEXAS LEGAL DIRECTORY

Foreign Law Lists

CANADA BONDED ATTORNEY
Canada Bonded Attorney & Legal Directory, Ltd.
223 Lonsdale Road
Toronto 12, Ontario, Canada

CANADA LEGAL DIRECTORY
Canada Bonded Attorney & Legal Directory, Ltd.
223 Lonsdale Road
Toronto 12, Ontario, Canada

CANADIAN CREDIT MEN'S COMMERCIAL LAW AND LEGAL DIRECTORY
Canadian Credit Men's Trust Association, Ltd.
456 Main Street
Winnipeg, Manitoba, Canada

CANADIAN LAW LIST
Canadian Law List Publishing Company
24 Adelaide Street, East
Toronto, Ontario, Canada

EMPIRE LAW LIST
Butterworth & Co., (Publishers) Ltd.
4, 5 & 6 Bell Yard, Temple Bar
London W. C. 2, England

THE INTERNATIONAL LAW LIST
L. Corper-Mordaunt & Company
Pitman House
Parker Street
London W. C. 2, England

KIME'S INTERNATIONAL LAW DIRECTORY
Kime's International Law Directory, Ltd.
5 Perrin's Court
London N. W. 3, England

ANNOUNCEMENT OF 1949 ESSAY CONTEST CONDUCTED BY AMERICAN BAR ASSOCIATION . . . .

Pursuant to terms of bequest of Judge Erskine M. Ross, Deceased.

INFORMATION FOR CONTESTANTS

Time When Essay Must Be Submitted:
On or before April 1, 1949.

Amount Of Prize:
Twenty-five Hundred Dollars.

ELIGIBILITY:

The contest will be open to all members of the Association in good standing, including new members elected prior to March 1, 1949 (except previous winners, members of the Board of Governors, Officers and employees of the Association), who have paid their annual dues to the Association for the current fiscal year in which the essay is to be submitted.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted.

An essay shall be restricted to five thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and absence of iteration or undue prolixity will be taken into favorable consideration.

Anyone wishing to enter the contest should communicate promptly with the Executive Secretary of the Association, who will furnish further information and instructions.

SUBJECT TO BE DISCUSSED

"What Is the Proper Place and Function of the Lawyer in Society?"

It is intended that this shall include the place and function of the lawyer individually and through Bar Associations in the United States, today and for the future, with particular emphasis on constructive thinking and the proposals as to:

1. The function of the lawyer in the relationship between the individual and the state.
2. The lawyer's relationship to government.
3. His work for clients.
4. His participation and leadership in public affairs.
5. Organization for making competent legal service available at moderate cost or free, for all who need it.
6. The maintenance of: a. Individual opportunity; b. Basic rights; c. Private property and enterprise; d. Our form of government as a constitutional republic.

The author is at liberty to select all or any of the aspects of the lawyer's functions here listed, as he may choose.

AMERICAN BAR ASSOCIATION
1140 N. Dearborn Street Chicago 10, Illinois

(Continued from page 92)

employers. In 1910 the customary initial compensation of new law school graduates in New York was $600 a year. With the expansion of the law firms serving Big Business and the consequent demand for competent legal talent, beginning salaries rose until in the late twenties they were about $2400. Today most of the large New York offices offer $3600 or more. Salary advancements of competent men are rapid, often as much as $1000 a year, until a customary top limit has been reached, varying with different offices from, say, $10,000 to $15,000.

In some offices men who reach the top salaries are permitted to remain on them indefinitely. In other offices the salary period is definitely understood to be one of apprenticeship. While every man who enters the office may hope to make it his permanent career, he may do so only by attaining partnership, a goal achieved by about one in fifteen. Otherwise he is expected to remain only so long as he is advancing in responsibility and salary, almost never more than ten years, for he must not bar the path of the younger men coming up from below.

It is true that the corporation lawyers, whether in large or small offices and whether young or old, usually work under the pressure of inelastic deadlines. But hard work has always characterized the successful lawyer. Young lawyers who assisted Seward more than a century ago tell that he and his two partners with their young law students would go back to the office nearly every night after supper, the students trying to copy as fast as the Governor would draw papers, working usually until about 10 o'clock, but often until daybreak.

It is also true that the magnitude of many of the legal matters of today, both in litigation and in corporate work, necessitates much more teamwork by a number of lawyers than was the practice even half a century ago. But the young man who becomes a mere robot or who finds such work monotonous probably lacks both the legal competence and the personality to be successful in any branch of modern practice.

"Gilt-edged social connections" and "strategic marriage" play a much smaller part in the advancement of young men in the large offices today than in the smaller offices and are of much less importance than they were in the days when most lawyers practiced alone and had to build their practices from nothing. The business-getting ability which counts for a young man in the modern "law factory" is that which derives from his capacity to do business well and command such confidence from existing clients that they send him new clients.

Specialization Is a Major Count in Indictment of the Bar

Specialization is a major count in the indictment against the modern Bar. It is said, with some truth, that our leaders of today, as well as our rank and file, are not so well-rounded professional men as formerly. But specialization has been forced upon us; we could not otherwise have met the needs of our clients. It became inevitable with the rise of Big Business; it has been greatly aggravated by the rise of Big Government.

Big Business of today is less litigious than were the rugged individual merchants and manufacturers of the old days. The modern corporate

client expects its business to be so handled as to keep it out of the courts. As a result most lawyers today devote the larger part of their efforts to avoiding litigation rather than conducting it. It has been estimated that from 80 to 90 per cent of the current legal work is transacted in the law offices rather than in the courts. The abstinence of so large a part of our profession from the work of the courts has doubtless had much to do with their decline in prestige and with the growth of administrative adjudication and arbitration.

In the large cities advocacy has itself tended to become a specialty. The law office with large corporate clients must, if it is to give them adequate legal service, have experts not only in advocacy, but in all the branches of the law which have attained importance. Thus arises the further plaint that "the big firms . . . are as inclusive as department stores". Granted, say the critics, that specialization is essential in such a field as tax law, why shouldn't the specialist retain the old professional attitude by practicing alone, or with one or two partners, rather than become a mere cog in a commercialized organization serving many clients in all fields? This, I submit, is not only an obsolete, but an altogether unrealistic, concept of the professional relationship. A profession fails in its duty to those it serves if it does not give them the most effective and convenient service possible. Are the clinics of our hospitals, or those such as the Mayo, unprofessional because they give their patients, under one roof, expert diagnostic ability and care for all bodily ills?

Legal Service to the Poor

But, say our critics, such medical organizations serve the poor who can pay little or nothing, as well as the rich who pay handsome fees, whereas the material rewards attainable in corporate practice have drawn the best brains of the law into the impersonal service of Big Business and left the common man without adequate legal assistance. Factually this charge has basis. The medical problems of the poor do not differ substantially from those of the rich; but that is not true of their legal problems. The experience gained in a business practice affords little competence to serve the poor in their personal, or even their property, problems. Nevertheless, all of us have a duty to see to it that justice is not denied to anyone for lack of ability to pay a compensatory fee. While some of our critics contend that our duty cannot be performed vicariously, it seems to me that such service can best be rendered by groups of lawyers trained as specialists in the kind of matters involved, such as those which man the legal aid societies of our cities, and by the legal clinics to provide personalized legal services at low cost. We therefore have a professional duty to see to it that such groups are financed and staffed to render to their clients service of the same competence upon which we insist for our office clients.

What About Public Influence of the Profession?

May we turn now to the question of the public influence of our profession and its alleged decline? During the first half of the nineteenth century learning in America was substantially the monopoly of the lawyers, the doctors and the clergymen. It was to those professions that the local communities and the nation looked for political leadership. But as we became an industrial nation, men of education also went into trade and industry. Is it not a snobbish attitude on our part to complain about any relative decline in our public influence which has resulted from the increasing influence of men in other walks of life due to the broadening of educational opportunity in America? As *Fortune* put it as far back as 1932: "The impression that the Bar has degenerated is produced by two misconceptions: the first an extravagant, exaggerated and not unsentimental idea of the dignity and importance of the practice of the law, and the second a snobbish and antiquated picture of the lack of dignity and comparative unimportance of business."

In the days of rugged individualism when, to use another phrase of Chief Justice Stone, "the lawyer of distinction was the gladiator and not the commander or officer of a regiment or . . . an army", the leaders of the Bar won their distinction in public appearances in the courts and in legislative halls. The corporation lawyer who heads a great law firm of today, working out at his desk a complicated reorganization or security issue, though he may be making a greater contribution to the national well-being, is less glamorous, and hence less newsworthy, than the advocate before a jury or an appellate court in a case of public note. The spotlight is almost never focused on him; his personality, however powerful, is likely to be overshadowed by the institution which he conducts; he tends to become anonymous. Thus he doubtless does have a less commanding voice in public affairs than did the earlier advocates, or than do the advocates of today, "for . . . the minds of men are more influenced by powerful personalities than by any institution, however efficient".

No Decline in Lawyer Participation in Public Affairs

The considerations to which I have adverted would lead us to expect a marked decline in the relative participation of our profession in political affairs. But the facts seem to be otherwise, at least as to national politics. Of the fifty-six signers of the Declaration of Independence, thirty, or 54 per cent, were lawyers; the Constitutional Convention of 1787 was attended by fifty-five persons, of whom twenty-eight, or 51 per cent, were lawyers. In the 80th Congress, of 435 members of the House, 228, or 52 per cent, were lawyers, and of the ninety-six members of the Senate sixty-four, or 65 per cent. Doubtless most of the latter are primarily advocates. But even among the office lawyers of our larger cities, there have been powerful personalities who have not been completely overshadowed by their institutions, and

whose influence in public affairs has been great—to cite but three from New York, John Foster Dulles, Robert P. Patterson and John J. McCloy. The successful fights for the repeal of the prohibition amendment and for an effective draft law for World War II were both largely led by corporation lawyers.

In the economic field the modern lawyer exercises much greater influence than did the old-time advocates. The corporation lawyer of today is trained to bring to bear upon mixed questions of law and business the kind of objective analysis which distinguishes our profession. It is not surprising that lawyers are widely sought as corporate directors, and that top executives of many of our largest corporations are former lawyers. Frequently corporate clients insist that their counsel shall sit as directors upon their boards. There seems to be no uniformity of policy on this matter. The current *Directory of Directors* lists some directorships in all of the five largest Chicago law firms, from two in the case of two firms to thirty-two in the case of one. Some firms, believing that the client is best advised by a lawyer who maintains an objective point of view and that such objectivity may be impeded by any participation in the client's management, refuse to assume a dual capacity and forbid both partners and associates to serve as directors of corporate clients. Few, however, are the firms able wholly to resist the insistence of clients upon exceptions. I believe that most of us would be greatly relieved if a canon of ethics were adopted forbidding a lawyer in substance to become his own client through acting as a director or officer of a client. But the practice is too widespread to permit any such expectation.

Influence in Economic Fields Imposes Great Obligations

The influence which we have in the economic field, whether acting solely as counsel or in the dual role of counsel and directors, imposes a high duty upon us as members of a profession sworn to an unswerving search for justice. All the criticisms of our Bar thus far discussed are of insignificant importance as compared with the charge that we have been in default in the performance of that duty. The alliterative phrases of the usually temperate Chief Justice Stone which I quoted at the beginning—"Specialized service to business and finance has made the learned profession of an earlier day the obsequious servant of business, and has tainted it with the morals and manners of the market place in its most anti-social manifestations"—were uttered at a time when it was the fashion to blame all our economic ills on Big Business, its bankers and its lawyers. But their substance has often been repeated from both within and without our profession, and often in even more bitter and cynical phrases.

It is, of course, damning us with faint praise, and no real answer, to point out that the morals and manners of the corporation lawyers are on at least as high a level as those of the practitioners in the courts, or even to point out that they are higher than the morals and manners generally to be found among the representatives of Big Government. Most of you will agree that no debtor is more unscrupulous than the Government and no creditor more cruel, that no plaintiff is more ruthless and no defendant more evasive.

Extremists Charge the Bar with Being Anti-Social

Over the last fifteen years the charge that the Bar serving business is anti-social has emanated principally from those who have espoused the more extreme so-called social legislation, whose objective has been the transfer of wealth from the industrious and thrifty to the indolent and prodigal and the substitution of government planning and control for our old system of private enterprise. There is, however, a *bona fide* divergence of opinion as to the social value of much of such legislation. Most of us, for example, agree that labor must be protected in its right to organize and to bargain collectively; but many of us believe that legislation which encourages mass violence in labor disputes is itself anti-social. It has become the vogue among those who consider themselves reformers to disparage in terms of opprobrium not only those who question any so-called social legislation, but also those who question any government controls of business or the propriety of their administrative interpretation or enforcement. Such disparagement has been encouraged by the extremes to which the United States Supreme Court since 1937 has carried the doctrine of judicial deference to administrative experience. Even a Roosevelt appointee to the Court has protested against the "encouragement given to conscious lawlessness as a permissible rule of administrative action". I question whether the challenge of legislation enacted under the urging of the President that Congress disregard doubts of its constitutionality, or of federal administrative action which to even a New Deal justice represents "conscious lawlessness", is any more anti-social than was resistance to the acts of the Parliament of George III by the lawyers among the colonial patriots.

But I would not for a moment suggest that those of us who have been engaged primarily in the service of Big Business have been beyond criticism. In the light of hindsight the corporation lawyers of the previous generation might well have given greater thought to the economic and social consequences of many of the transactions in which they did the legal engineering to effect the lawful attainment of their clients' objectives. So too, in the light of hindsight, undoubtedly we of the present generation relied too much on the old doctrine of *caveat emptor* during the lush twenties. Undoubtedly, too, in many cases we did not adequately stress even the legal importance, let alone the moral necessity, of strict avoidance of conflicting interests in fiduciary relationships. Probably too frequently our advice has been too limited to the technical validity of proposed action without regard to its social or economic implications

or its possible adverse effect upon the public relations of our clients. For such defaults there is an historical explanation, even though it may not excuse. The lawyers of the old days were highly legalistic in their approach to their cases, and gave much more regard to form than to substance. They prosecuted or defended to the best of their ability and did not regard as unethical resort to every available technicality. As a result the advocates of the late nineteenth century who transferred to corporate practice regarded it as their function to tell their clients how they could lawfully do what they wanted to do, seldom to question the propriety of the ultimate objective. This narrow attitude on the part of the lawyers was encouraged, if not insisted upon, by most of the clients. The corporate executives and bankers of the old days usually resented any political, social or economic advice from their counsel as beyond the proper field of the lawyer.

The unhappy experiences of the 1930's have materially changed these attitudes. Today the American lawyer deals with the problems of his business clients on a much broader basis, considers substance as more important than form and attempts to relate legal problems to their political, economic and social implications. The teaching of our law schools is accentuating this broadening function of the modern lawyer. The clients of today also generally recognize the interrelation of legal questions with political, economic and social questions.

Long Service to One Corporation Might Endanger Independence

While the charge that our profession has become "the obsequious servant of business" is, I believe, intemperate and exaggerated, it must be conceded that professional service to a single corporate client long continued contains a real threat to the lawyer's independence of thought, or at least of expression. This threat is necessarily greatest in the case of the salaried members of the Bar employed by the corporate legal departments. It is not human to expect that corporate executives will view with equanimity crusading espousal by members of its legal staff or of its regular outside firm of counsel, of political, economic or social doctrines believed to be against the corporation's interests. Loyalty to the client is a fundamental tenet of our profession. Where the limits of such loyalty are to be drawn is often a difficult question.

The function of those of us who serve industry, trade and finance is not alone to keep them technically within the law, but to do our part toward keeping them functioning smoothly, contributing to our national prosperity and our high standards of living and furnishing the individual opportunity which has meant America. Despite occasional defaults, our profession, on the whole, has done that job well. It has made great contributions to our economic development, many also to our social development, and it has conducted itself with standards of morals and manners fully abreast of the morals and manners of the times; indeed usually ahead of them.

Big Business, Big Labor and Big Government are all here to stay. But in the gigantic concentrated power of their aggregate collectivism there is real danger that they may be leading us along the road to state collectivism. If we believe that such an end would be a tragedy, and that individual freedom of opportunity in a system of private enterprise should be maintained, it behooves all of us who render "specialized service to business and finance" to seek such solutions of the legal problems of our clients as are compatible with changing social concepts and as will avoid the abuses of economic power to which our profession too often contributed in past decades. Deterred neither by self-complacence nor by the slanders of pseudo-reformers, we must strive, not alone for improving standards of practice, but as well for improving law, better adapted to the needs of the times and better administered, and by the same token we must continue to challenge laws we believe anti-social and administration we believe arbitrary, never forgetting that the ultimate objective of our profession is that complete justice shall not only be granted to, but shall be enforced against, all members of society, rich and poor alike.

(Continued from page 104)

If one justice believes in a more powerful state, if he is unrestrained in his work for national efficiency by any belief in absolute standards of right and wrong as applied to law or in natural law or eternal justice; if he thinks that man does not differ in essence from an ape or a grain of sand; if he inclines to the pragmatist view that the only test of truth is workability, that is, efficiency in carrying out the popular will, then individual and minority rights stand upon slippery ground. If he believes with Justice Holmes[22] "that the claim of our special code to respect is simply that it exists, that it is the one to which we have become accustomed and not that it represents an eternal principle" then there will be an insidious erosion of constitutional right. If, on the contrary, there are other justices who believe that law is reason, not merely command, that there are objective absolute standards of truth, of legal right and wrong, that there is a higher law or a natural law, then there will be disagreement in the Court.[23]

22. 12 *Harv. L. Rev.* 460 (1899). See R. W. Mulligan, S.J., "A Note on Legal Pragmatism", 21 *Thought* 513-522 (1946); Miriam Theresa Rooney, "Mr. Justice Cardozo's Relativism", 19 *New Scholasticism* 1-47 (1945), "Borrowings in Roman Thought and Christian Thought", 6 *The Jurist* 3 (1946), *Lawlessness, Law and Sanction* (1937).

23. As all persons are said to be born Aristotelian or Platonist, so differences, particularly with respect to government power are due to some extent to inescapable bias either toward liberty or toward order. See Ben W. Palmer, "Liberty and Order", 32 A.B.A.J. 731 (1946).

4 The Court and the Popular Will

If a new civilization is being born,[24] certainly the law is in the remaking. Roscoe Pound, as we have indicated, prophesied a creative epoch before the revolutionary demands made upon the law after World War I and as a result of the great depression.[25] In 1934 Justice Frankfurter wrote:[26] "Plainly we are in the midst of another great creative period in the Court's history when ultimate issues of society will for a time steadily solicit its judgment." And since these are ultimate issues, the challenge to the bench and Bar of America and to all intelligent laymen is to help the Justices of the Court towards a judgment which will reconcile liberty and law and preserve against erosive philosophies individual and minority rights while improving the legal economic order.

Skepticism is sterile and unsatisfactory because men cannot long endure without an affirmative vertebrate truth. It is no defense against false aggressive philosophies. It invites them to fill the vacuum it creates. Pragmatism and relativism tempt men to live from day to day on the shimmering surfaces of temporary waves of anticipation and content, oblivious of the undertow of totalitarian philosophies that, unheeded, will bring them to destruction. If they read history objectively and zealously search for ultimates, they will bring greater unity in the public mind and harmony in the Court, to its enhanced prestige[27] and a restoration of sound principles of judicial review and of constitutional government. And they will do this by bringing to fruition the present renaissance of scholastic natural law—the great heritage of Greco-Roman-Anglo-American Christian tradition. For it offers an enduring basis for stable constitutional freedom in the America that we love.

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24. For example, P. A. Sorokin, *The Crisis of Our Age* (1941).

25. See also, Frankfurter in *Harv. L. Rev.* 35 (1931).

26. 48 *Harv. L. Rev.* 280 (1934). It may be noted here that Justice Frankfurter in 60 *Harv. L. Rev.* 326 (1947) indicates his conception of law "Not as the disguised manifestation of mere will but as the effort of reason to discover justice".

27. For Robert H. Jackson on the subject of dissent as weakening the Court, see Jackson, *op cit.* page 180, *supra* n. 18; *Hearings* page 47, and Leon Green, *Hearings* 226; *supra* n. 18.

10 Judicial Conference

(Continued from page 121)

sented to the Conference the report of the Committee on Bankruptcy Administration, of which he was the chairman. The report of the Chief Justice, summarizing the data thus presented observed that "the portion of monies received from the assessment of fees and charges during the year ear-marked for deposit in the referees' salary and expense funds, exceeded the amounts expended from these funds . . . denoting a healthful financial condition, and a self-sustaining basis, for the system . . . . Estimates submitted by the Administrative Office indicated a continuation of the increase trend in filing, and for the year 1949, 26,000 cases were expected to be filed, with 32,000 filings in 1950. Reports concerning the dispatch of the Referees' business were most satisfactory, and reflected a high level of efficiency in its management".

The Conference then authorized a number of changes in the number, salaries, territories and places of office and status of referees in certain districts. It adopted a resolution (1) that no part of the $45.00 filing fee paid upon the commencement of a bankruptcy proceeding is refundable upon the dismissal of the proceeding, and (2) that the additional charges for the salary and expense funds, promulgated by the Conference, are to be collected in all straight bankruptcy and arrangement cases under Chapter XI of the Bankruptcy Act, administered before a district court without reference to a referee in bankruptcy, in order that the costs of administration may be uniform, and to provide necessary monies for the maintenance of the referees' salary and expense funds. The Conference also adopted a resolution amending Paragraph 1 of the schedule which it had previously adopted, of charges for special services relating to and connected with proceedings before referees, so that the paragraph will read as follows:

> 1. For the preparation and mailing of each set of notices in asset cases and in cases filed under the relief chapters of the Bankruptcy Act, as amended, in excess of 30 notices per set, 10 cents

for each additional notice on the first 10,000, 5 cents per notice on the next 10,000 and 3 cents per notice on the balance, *provided*, That in no proceeding administered in straight bankruptcy shall the total charge for the referees' expense fund for special services exceed 25 per cent of the net proceeds realized.

Upon recommendation of the Committee on Bankruptcy Administration, the Conference renewed its recommendation that Section 57j of the Bankruptcy Act be amended to stop the running of interest and penalties on tax claims at the time of the filing of the petition in bankruptcy, and that Section 58d be amended to permit the publication of the notice of the first meeting of creditors to be discretionary, as in the case of other notices.

It also approved of the proposal to amend Section 62b(1) of the Act to permit referees to receive either a reasonable *per diem* allowance in lieu of subsistence while travelling on official business or their actual expenses, not exceeding $8.00 per day payable upon their certificate (the present maximum allowance is $7.00 per day).

The Chief Justice Reviewed Report on Economy in Court Operation

The Chief Justice then reviews the activities and report of the committee appointed by the Conference at its 1947 session to consider ways and means of economy in the operation of the federal courts. The report was submitted to the Conference by the committee's chairman, Chief Judge John J. Parker. As a result of the studies made by the committee and others appointed in each circuit, the Committee reported that "considerable improvement had already been achieved".

The committee observed that throughout the country "court is now required to be held at many places where such a service is entirely unnecessary", that although the situation has been recognized by the judges, a complete solution can be obtained only by legislation, and that this should be in such form as to permit the district judges to deal with the situation by rule of court rather than to endeavor to secure independent legislation as individual cases arise. The Committee was of the view, that this is not a subject that should be left to the sole discretion of the district judges, but that the circuit judges, as members of the circuit judicial councils "have responsibility as well as the district judges for the proper administration of justice within the district and should logically have a voice in the matter". It therefore recommended that the suggested legislation should require approval by the circuit councils before changes in the present statutory requirements are made by rule of court, in order to provide "a broader point of view in the consideration of these problems". Accordingly, the Conference recommended the prompt enactment of the following revision of Section 138 of Revised Title 28 of the United States Code:

> § 138. Times, places and divisions for holding court subject to rule.
>
> (a) The times for holding regular terms of court at the places fixed by this chapter shall be determined by rule of the district court.
>
> (b) Notwithstanding the provisions of Sections 81 to 131, both inclusive, of this title, divisions of districts and places for holding regular terms of district court may be changed or abolished by rule of the district court upon a finding that the public interest so requires and approval by the judicial council of the circuit.

The Conference also recommended that immediate consideration be given by the district judges and circuit judicial councils to the exercise of the powers given them by Sections 138, 140(a) and 141 of the new Judicial Code, observing that these "provide a framework for substantial reductions in expenses and that their use to accomplish such economies, consistent with the proper and efficient dispatch of the court business, is warranted".

The Conference also urged that the district judges make a careful survey of existing conditions in their respective districts, with a view to the elimination, under Section 751 of the Revised Code, of branch offices of the clerks of the courts that are superfluous, and the consequent saving of considerable sums of money.

Economies in Jury Trials Urged by Conference

The Conference discussed the possibilities for economy and increased efficiency by the consolidation of districts which lie within a single state, and adopted the following resolution:

> BE IT RESOLVED, That, henceforth, the Judicial Conference of the United States will definitely oppose the creation of any additional judicial district; and, where it is found that additional judicial service is necessary, it will recommend that such service be provided by the creation of additional judgeships within the then existing judicial districts.

The Conference also approved the suggestion of the Committee on Economy that each judge serving divisions of the court where no judge has his residence should endeavor to administer his docket with the least possible number of court sessions, in order to reduce to the minimum the main items of expense required for the holding of court away from his residence.

Economies in jury administration, which would result from the use of jury pools in multiple-judge courts where judges sit simultaneously, and from the synchronization of times for jury trials, to make possible the most efficient use of the jury pool, were considered by the Conference, and recommended to the courts. Other means of economizing in jury administration recommended were the elimination of unnecessary sessions of court in outlying divisions, restrictions on the size of jury panels called, more widespread employment of the practice of requiring prospective jurors to answer questionnaires as to their qualifications, before summoning them to the court, and the selection as jurors of qualified persons who reside within a reasonable distance of the place where court is held. The Conference also recommended that each chief judge appoint for his circuit a committee to investigate the use of jurors, and make recommendations to increase the efficiency of that use, and it directed the Administrative Office to survey the courts in metropolitan areas and furnish information to the Conference as to particular methods to promote economy in the jury administration of these courts.

Speaking of the value of pre-trial procedure, as a means of economy, the Conference urged continued consideration and study of the device by judges who do not use it, and its broadened use by those who do. It emphasized the fact that "10 years of experience in the federal courts have demonstrated beyond peradventure that the pre-trial procedures result not only in greater efficiency in the judicial process but in great economies in time and money for the courts, the litigants, and the public". In this connection, the Conference also called attention to the value of the related provisions of Rules 26-36 of the Federal Rules of Civil Procedure dealing with depositions and discovery, and of Rule 56 providing for summary judgment, urging the district judges to promote their use.

The Committee on Economy had called the attention of the Conference to the highly important function in the efficiency of the courts, of the offices of the clerks of court. It urged the desirability of adoption for those offices of the most efficient office methods, and labor-saving devices, and it directed the Administrative Office to expand its activities in this field. This recommendation was approved by the Conference.

Other suggestions for economy approved by the Conference were recommendations that all of the courts of appeals give serious consideration to the adoption by local rule of provisions to make operative Subdivision (o) of Rule 75 of the Federal Rules of Civil Procedure, which provides for the transmission to the courts of appeals of the original papers in the district court files, instead of copies of them, and the rule now in force in some circuits which permits and requires pertinent parts of the record to be printed as appendices to the briefs, thus dispensing with the cost of printing the full record separately. Commenting on these recommendations, the report states "that the experiences of those circuits in which these practices were followed, clearly demonstrated that substantial savings in labor, time, and expense to the courts and the parties resulted from their use".

The Chief Justice included in his report a section giving the status of various legislative proposals previously recommended by the Conference. The first of these is a bill to provide for the more adequate protection of the rights of indigent litigants in the federal courts. The Conference agreed with its committee on this subject that the proposal should provide that counsel appointed to represent poor persons in criminal cases in trial courts on a compensated basis should continue to represent them and to receive compensation on appeal in proper cases, and it adopted a draft of a section to provide for this. It concluded that it is inadvisable at this time to include in its proposed legislation provisions for the payment of compensation to counsel appointed to represent poor persons petitioning for habeas corpus. It concluded that, in those districts having cities of over 500,000 population, the representation of poor persons in criminal proceedings might be by counsel appointed and compensated in the individual case, where the district court so recommends and the circuit council approves. Otherwise in districts with cities of 500,000 population the representation must be by appointed public defenders, if there is to be any system of compensation of counsel for poor defendants.

Federal Youth Correction Authority Favored by Conference

After directing that certain changes be made in its previous recommendation regarding the enactment of a law to provide for a federal youth correction authority, the Conference "reaffirmed its interest in the prompt enactment of legislation establishing a correctional system for youthful offenders convicted in the courts of the United States along the lines previously recommended, and it directed that the Congress be again

informed of its deep interest and feeling in this proposal in the hope that favorable action thereon may be had in the immediate future".

It recommended that the bills, previously proposed by it, to provide for the review of orders of the Interstate Commerce Commission and certain other agencies by the courts of appeals, with review by the Supreme Court on *certiorari*, rather than by three-judge district courts with direct appeal as of right to the Supreme Court, be approved in the form in which they were reported in the 80th Congress by the majority of the House Committee on the Judiciary; since it was its view that Sections 8 and 10 of those bills fully protect the rights of the commissions whose orders are in question.

The Conference reaffirmed its approval and recommendation previously given to the legislation providing for a modernized jury commission, and uniform qualifications of jurors for the federal courts, "as well as the repeal of Subsection 4 of Section 1861 of Title 28, United States Code, if such action was deemed necessary". It reaffirmed its indorsement of legislation to provide a method of treatment, care and custody of insane persons charged with or convicted of offenses against the United States.

Chief Justice Appoints New Committees

The Conference Committee on Codification and Revision of the Judicial Code, reporting through its chairman, Judge Albert E. Maris, reported the completion of its task by the enactment of Public Law 773, which embodied the revision of Title 28 of the United States Code. The Conference thanked the committee and continued it to consider matters of clarification, the correction of errors and such other matters as might be specifically referred to it by the Conference.

Reports of the Committees on Judicial Statistics and Pretrial Procedure were received and approved, and ordered circulated to all judges. The Conference urged that the suggestions and recommendations of these committees be earnestly considered by the judges. The report of the Committee on the definition of a "felony" to make it depend upon punishment actually inflicted rather than that which could be lawfully imposed was received and ordered circulated to the judges for the purpose of obtaining their views regarding the proposal.

The estimates of expenditures and appropriations for maintenance of the courts and the administrative office for the fiscal year 1950 and for 1949 deficiencies were considered and approved.

All committees except certain specified ones which had completed their work were continued.

The Chief Justice then reported the composition of two new committees, one with Chief Judge Calvert Magruder, of the First Circuit, as chairman, to study a proposal for the elimination or modification of the provision for a three-judge district court in anti-trust litigation, and another, under the chairmanship of District Judge William C. Coleman, of Maryland, to consider methods for dealing with the wages and effects of deceased or deserting seamen. The Chief Justice was empowered in his discretion to increase the membership of existing committees, reconstitute discharged committees, fill vacancies and appoint new committees. The committee appointed to advise and assist the Director of the Administrative Office was continued, and the Conference thereupon recessed subject to the call of the Chief Justice.

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